Mississippi Law Journal

SYMPOSIUM

U.S. ENVIRONMENTAL JUSTICE AND THE LAW

SPONSORED BY THE

American Bar Association Section of Environment, Energy, and Resources

FOREWORD

David W. Case

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FOREWORD

AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES SYMPOSIUM

U.S. ENVIRONMENTAL JUSTICE AND THE LAW

David W. Case[*]

On April 1, 2011, the American Bar Association Section of Environment, Energy, and Resources (ABA-SEER) held a symposium on U.S. Environmental Justice and the Law at the University of Mississippi School of Law. The law school and the William Winter Institute for Racial Reconciliation at the University of Mississippi were co-hosts of this event. The symposium brought together representatives of academia, government, the private bar, nongovernmental organizations, and the corporate sector from around the country to discuss current issues in the field of environmental justice.

The idea for ABA-SEER to hold the symposium at the University of Mississippi School of Law was the brainchild of two individuals, Steve McKinney, then chair (now immediate past chair) of ABA-SEER, and John Milner, a member of the ABA-SEER Council. Both are graduates of the University of Mississippi—including Milner as a graduate of the law school—and they pursued their desire to bring this event to their alma mater enthusiastically and relentlessly.

McKinney and Milner's aspiration for ABA-SEER to host this symposium at the law school was influenced by a number of factors. As alumni well aware of the University of Mississippi's symbolic place within the history of the national civil rights

[*] Associate Professor of Law, University of Mississippi School of Law.

movement, as well as the university's important leadership role in racial reconciliation efforts over the past several years, McKinney and Milner viewed the university as an especially fitting venue for national dialogue on the subject of environmental justice. Moreover, holding the symposium at the law school furthered ABA-SEER's commitment to more active involvement with law school students and faculty. And finally, in January 2011, a few months prior to the date for the symposium, the University of Mississippi School of Law moved into a brand new facility—a $50 million state of the art Leadership in Energy and Environmental Design (LEED) certified building. As proud Ole Miss alumni, both McKinney and Milner were motivated by the opportunity to show off the law school's impressive, new, environmentally friendly facility to fellow members of ABA-SEER and other symposium participants from around the country.

We at the University of Mississippi School of Law are extraordinarily grateful to Steve and John for working so tirelessly to bring this important event to their alma mater. The law school was honored and privileged to host the symposium as well as the 2011 Spring Council Meeting of ABA-SEER. Special thanks also go to the members of the ABA-SEER's Symposium Planning Committee for nearly a year of dedicated work in organizing the event. Members of the planning committee included McKinney (Balch & Bingham, Birmingham, AL); Milner (Brunini, Grantham, Grower & Hewes, Jackson, MS); Alexandra Dapolito Dunn (Executive Director, Association of Clean Water Administrators, Washington, DC); Tara Duhy (Lewis, Longman & Walker, West Palm Beach, FL); James McDonald (U.S. Environmental Protection Agency, Washington, DC); Nicholas Targ (Holland & Knight, San Francisco, CA); and Professor David Case (University of Mississippi School of Law, Oxford, MS).

In addition to co-hosting the event, the law school's contribution to the ABA-SEER Symposium effort also includes this issue of the *Mississippi Law Journal*, dedicated to publication of materials and articles from and related to the symposium. The materials included begin with the welcoming remarks that opened the symposium from law school Dean Richard Gershon; ABA-SEER Chair McKinney; Dr. Susan Glisson, executive director of the William Winter Institute for Racial Reconciliation at the

University of Mississippi; and Trudy Fisher, director of the Mississippi Department of Environmental Quality.

The symposium's opening, keynote, and closing addresses are reproduced following the welcoming remarks. Professor Eileen Gauna of the University of New Mexico School of Law delivered the opening address, which provided an overview of historic and current legal developments in U.S. environmental justice. The keynote address was delivered by Jewell A. Harper, deputy assistant regional administrator of Region IV of the U.S. Environmental Protection Agency in Atlanta, Georgia. The closing address was given by Daria E. Neal, deputy chief, Federal Coordination and Compliance Section, Civil Rights Division, United States Department of Justice, Washington, DC. Also included are the remarks of Malcolm Jackson, assistant administrator for the Office of Environmental Information and chief information officer for the Environmental Protection Agency, who discussed the strides taken by the EPA to provide greater accessibility of information.

The symposium featured a series of roundtable discussions where experts from a variety of perspectives discussed (1) how environmental justice conversations have been successfully incorporated into facility expansion and siting decisions; (2) advances in information availability and the role of this information in environmental justice claims and cases; and (3) legal and practical responses to environmental justice concerns, and case studies in moving forward in constructive and positive ways. A number of speakers from these roundtables contributed reflection essays to this issue of the *Mississippi Law Journal*, including Melissa McGee-Collier, Steve Renfroe, and Alec D. Van Ryan. These essays are based either on remarks made by these participants during the roundtables or were prepared by the participants on broader environmental justice subjects following the symposium. In addition, Alexandra Dapolito Dunn of the Association of Clean Water Administrators and Pace University School of Law student, and ACWA law clerk, Adam Weiss coauthored the article *Environmental Justice in Permitting: State Innovations to Advance Accountability*. Also, Professor David Case from the University of Mississippi School of Law contributed an article entitled *The Role of Information in Environmental Justice*,

based on the roundtable topic he moderated at the symposium from which the title of the article is taken.

ABA-SEER also held a national writing competition for law students on the subject of environmental justice in advance of the symposium. The three winners of this writing competition were subsequently recognized by ABA-SEER at the symposium for their contribution to the scholarship in this important field of law. Each of these winning entries is published in this issue. The first place paper, entitled *The Power of Community Action: Environmental Injustice and Participatory Democracy in Mississippi*, is contributed by April Hendricks Killcreas from the University of Mississippi School of Law. The second place paper was authored by Gavin Kentch from the University of Michigan Law School entitled *A Corporate Culture? The Environmental Justice Challenges of the Alaska Native Claims Settlement Act*. The third place paper, entitled *Environmental Justice: Deciphering the Maze of a Private Right of Action*, was written by Nicholas C. Christiansen from the University of Memphis School of Law.

OPENING REMARKS†

RICHARD GERSHON*

Good morning and welcome to the University of Mississippi School of Law. My name is Richard Gershon and it is my honor as dean of the law school to welcome you this morning. I am really happy to be here with you this morning. I understand the importance of this conference and what it means not only to the State of Mississippi and to the university, but to all of us. The subjects discussed here today are very important.

I want to thank the American Bar Association Section of Environment, Energy, and Resources for allowing our law school to host this important conference. We cannot thank them enough. This is the perfect year for the University of Mississippi School of Law to host this conference. First of all, the law school recently moved into this beautiful, Leadership in Energy and Environmental Design certified building of which we are very proud. The university has undertaken a green initiative and is stepping up its efforts to take leadership in environment and energy, and we are proud of that. Second, our second-year law student April Hendricks Killcreas's paper won first place in the ABA-SEER Environmental Justice Student Writing Competition held in conjunction with this symposium. Additionally, I am really proud of my colleagues David Case and Stephanie Showalter who coached the law school's moot court team that won first place this year at the twenty-third annual Pace National Environmental Law Moot Court Competition in White Plains, New York. *Storm King*, the original painting, which is the traveling trophy that resides with the current champion of the Pace National Environmental Law Moot Court Competition, is now hanging proudly outside the law school's moot court room. We could not be

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† The following Opening Remarks and Selected Symposium Addresses are edited transcripts from the 2011 American Bar Association Section of Environment, Energy, and Resources symposium on U.S. Environmental Justice and the Law. This symposium was held at the University of Mississippi School of Law on April 1, 2011.

* Dean and Professor of Law, University of Mississippi School of Law.

prouder of what the law school's environmental moot court team accomplished this year.

It is now my pleasure to introduce Steven McKinney from Balch & Bingham in Birmingham. As you are aware, Steven is the chair of ABA-SEER, and, again, we are so grateful to the section for bringing this conference to our school today. Thank you, Steven.

STEVEN G. MCKINNEY*

Thank you. I am Steven McKinney, and I am the chair of the American Bar Association Section of Environment, Energy, and Resources. It is my distinct privilege and a matter of personal pride to welcome you to this American Bar Association Symposium on U.S. Environmental Justice and the Law.

Before we talk about the purpose of this symposium and the opportunity before us today, there are people who have committed themselves to this important event in such a way that without them it would not have happened. Chancellor Dan Jones of the University of Mississippi immediately placed his full support behind this symposium the moment it was proposed. The university community has been a committed partner in this event from the beginning. Dean Gershon of the University of Mississippi School of Law, who came to Ole Miss after we began the project, joined in this adventure with enthusiasm and has provided the full support of this great law school. And Professor David Case right here at the Ole Miss law school gave many, many hours of detailed support in the planning and the execution of those plans from the beginning, even until this morning. I want to say thank you to Ole Miss for working with us on this important conference.

Our section set out to conduct this symposium in a somewhat unique way in recognition of the somewhat unique nature of our subject. One goal from the beginning, which we have achieved, was to encourage widespread participation without cost to the participants. To do that, we needed sponsors who believed in the value of a meaningful dialogue on environmental justice and were willing to provide financial support to see it happen. On behalf of the entire American Bar Association, let me express our appreciation to the Chevron Corporation and to 3G Services, Inc. for their gracious sponsorship of this symposium. I also want to thank a number of our colleagues and their law firms who stepped up with financial support to help make this happen. They are Bergeson & Campbell; Beveridge & Diamond; Brunini, Grantham, Grower & Hewes; Crowell & Moring; Phelps Dunbar; Sidley

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* Partner and Chairman of the Environmental and Natural Resources Section, Balch & Bingham LLP, Birmingham, Alabama. 2010-11 Chair, American Bar Association Section of Environment, Energy and Resources.

Austin; Stites & Harbison; and a little firm called Balch & Bingham.

Finally, I must thank our planning committee—James McDonald, Tara Duhy, David Case, and, in particular, John Milner and Alex Dunn—who provided incredible leadership for this event. These folks did it all and have done it all since I charged them with this mission almost a year ago. Countless conference calls went into the planning of this event, and thankfully, I was not on most of them, for which I am really grateful. Alex and John, in particular, I thank you for the leadership you have shown in making this symposium a reality.

Another goal we had was to truly and actually engage with law students, and, as the dean has mentioned already, we had a writing competition on the subject of environmental justice, and after this panel, we are going to give awards to the students who won the competition. We are really excited about the involvement of students in this symposium.

So, why discuss environmental justice? Environmental justice has been a significant issue in our country for a long time, even before lawyers started talking about it. The fundamental issues are questions of fairness and equity in the quality of the environment relied upon by people of all kinds for life and happiness. Issues of such an important nature must be examined. But these issues quickly translate to questions of legal substance, legal procedure, and the application and impact of legal practices and processes long thought to be merely routine and, by nature, benign. Lawyers need to know about these issues if they are to be reliable guides in the increasingly complex system of environmental laws and regulations. And all people need to have the opportunity to talk about these issues if that system is to be regarded as worthy of respect and capable of guiding our system, our society.

So why is the Section of Environment, Energy, and Resources interested in the subject of environmental justice? Our section has a long-standing reputation for serious and even-handed examinations of legal issues in our chosen fields, even sensitive legal issues. In fact, there is no organization better suited to help produce that meaningful discussion and conduct that balanced examination on difficult issues of environmental law and policy

than this Section of Environment, Energy, and Resources in the American Bar Association. Our stated mission as a section is to be the premier forum for strategies and information for lawyers practicing environment, energy, and resources law. That mission includes a strong commitment to public service through information and dialogue on issues of law and policy. That mission cannot be accomplished without extending yourself, without investing yourself, without leadership that has the potential to be of service to the profession and to the public.

Why have this dialogue here at Ole Miss? Our purpose is to conduct a genuine and thoughtful symposium on environmental justice. ABA-SEER needed a partner committed to the importance of the subject and capable of adding substance and the gravity of earnest inquiry to the dialogue. Ole Miss is a place where the most serious issues of race and reconciliation have played out in real and lasting ways. With the law school's reputation for intensive legal scholarship and focused academic effort, Ole Miss provided the perfect place, time, and context for this dialogue. The enthusiastic support of the chancellor of the university, the dean of the law school, the faculty, and the students has made the symposium not only possible, but clearly meaningful and capable of lasting impact.

On behalf of our section, I am completely satisfied that we are right where we should be, doing exactly what we should be doing, and we are delighted and very proud that all of you have chosen to join us in this humble effort to advance our common understanding of this important issue. Thank you very much for being here. We look forward to what you have to say and to the entire discussion. Now it is my privilege to turn your attention to Susan Glisson, the director of the William Winter Institute for Racial Reconciliation here at the university.

DR. SUSAN GLISSON*

Thank you. Good morning. It is a great honor for the William Winter Institute for Racial Reconciliation, which I have the privilege of directing, to be a part of this symposium. We are incredibly grateful that you have decided to be here to engage in honest and open conversations that are necessary to making the world a better place.

I want to tell you a little bit about the Winter Institute. We actually began here in these kinds of honest and difficult conversations. In 1998, the University of Mississippi hosted the only Deep South public forum for President Clinton's Initiative on Race. We gathered together about 160 people in ten different dialogue groups who met every week for six weeks to talk about how race might intersect with business, the arts, education, housing, healthcare, and religion. The environment was also included among the topics. And I must tell you that the most contentious dialogue group that existed was the environmental group. It was an interracial group. Its members were supposed to work together to identify some issues that they would prioritize in terms of importance and then lift those up to President Clinton's advisory board that was chaired by the esteemed historian John Hope Franklin, who would come to hear the reports of these dialogue groups. The environmental group could not come to consensus. The African American members of the community were concerned about a local black neighborhood that did not have potable water, and the white members of the environmental group were concerned about the potential destruction of a forest just north of town. They could not reach agreement about that issue. And it became so contentious that the night before Dr. Franklin and Governor Winter and others on that advisory board were supposed to fly in for this major event, the African American gentleman who had been elected to represent that group decided to resign because he did not want to be a part of the panel if it could not come to consensus and include the issues that black voices had lifted up.

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It was a learning experience, a painful one, and issues like race and the environment or issues like race and any other issue that it intersects with often require more time than we typically give them. So it is important to be able to stop and take the time to examine the issues carefully, and thoughtfully, in safe spaces where we can be honest and open and truthful. We have been learning that it is important to build a bridge of trust that is strong enough to bear the weight of the truth that we have to tell. And that is what we are hoping to do at the William Winter Institute for Racial Reconciliation, and we are so glad to be in partnership with our colleagues on campus who are engaged in those kinds of conversations. So I encourage you, I applaud you for what you are doing. Please let us know how we can be of assistance as we go forward together. Thank you.

TRUDY FISHER*

Thank you Steve. Good morning. I am Trudy Fisher, director of the Mississippi Department of Environmental Quality. For our out-of-state guests, please indulge me just a moment. Dean Gershon and Steve, thank you for hosting this symposium at Ole Miss. As you might expect, in our department we have many wonderful engineers from another university in our state, Mississippi State University, but as an alumnus of Ole Miss, I want to say that it is wonderful for this symposium to showcase *The* University of Mississippi. Susan, I appreciate your comments and obviously, you and I did not talk before this morning, and as I look at my notes and your comments, you would think we had collaborated and it is obvious that we have both been through the fire.

When we were invited, and when John Milner first approached me about the participation of MDEQ in this event, I was thinking what a wonderful opportunity this symposium represented, and I hoped this event would allow an open dialogue and a safe place within which to have it. I hope this symposium will be a forum for discussion so we can talk about these issues and move forward on protecting the environment for everyone and on issues of environmental justice in Mississippi and in all states.

People do not really care what you know until they know you care. They really do not. And as lawyers, scientists, engineers, and technicians we are really great at talking about the law and we are great at communicating what the science says. The difficult part in all of this is communicating the caring part. This involves the people part, the human part of protecting the environment, and human health. Of course, ultimately, science should prevail, the data should always prevail, the law should prevail, but we have got to recognize the human element as we talk about science and law in symposiums. We can talk about the science and law all day long but we must recognize that, for this issue, science and law are resting on a huge reservoir of trust. And until we make sure that reservoir of trust is there, then the environmental justice discussion is not going to move forward and we are going to

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* Executive Director, Mississippi Department of Environmental Quality, Jackson, Mississippi.

keep having difficult discussions. Later on in the day, we are going to have opportunities to talk about success stories, and success stories have happened where we have filled that reservoir with trust, and where it is not filled with trust, we did not make progress.

Today is an opportunity for us to build new relationships, to continue to strengthen existing relationships, and to continue to fill that reservoir with trust so that we can all talk about the science, so we can all talk about the law. Because every time that we get into discussions about environmental justice, ninety-nine percent of the time everyone at the table has the same goal. But it is how we accomplish those goals that seem to make things run askew and it really comes down to relationships and trust. One of the things that I am looking forward to today is hearing input from others on your insights on how to establish trust, how do you rebuild trust, how things work in other states, and to learn from others. We are so happy to be here and look forward to being a part of this discussion throughout the day.

SELECTED SYMPOSIUM ADDRESSES

EILEEN GAUNA*

First of all, I want to thank everyone here at *Olé* Miss for inviting me to come speak to you. And I get to say that because I am a brown girl from New Mexico. *Ándale Olé* Miss!

Professor Alex Dunn is very clever. She first asked me to do a panel presentation, and I thought, "Yeah, I can do that. I can go and sit on a panel, put in my two-cents worth, and then sit back and listen and learn a lot." But that was not to be. Alex decided I needed to earn my lunch and gave me bigger marching orders and said, "Oh, by the way, you have to lay the ground work, the foundation, for this whole thing." I said, "Oh, gee, thanks a lot."

But now I have to thank her because it really did get me to reflect upon environmental justice—the whole movement—in a much broader way. Reflection of this nature is important at this particular conference for several reasons. Here we have an ABA conference for the section members combined with law students at Ole Miss. That is an interesting mix, but it puts me in a dilemma because I have two distinct audiences. I solved that dilemma, however, because I said to myself, "Oh heck, I'm just going to talk to the students and the lawyers can just deal." So my remarks are targeted mainly to law students, but hopefully there will be some insight for the lawyers as well.

Secondly, this is a conference on facility siting, expansion, and permitting. Those issues continue to be important issues in environmental justice and it's certainly the genesis of the movement. But the movement has moved way beyond that, and activists have found themselves dealing with a much wider range of issues. For example, environmental justice has gone international, and is now dealing with energy and climate policy, as well as disaster response. That said, a tough nut to crack is the cluster of issues at the basic siting and permitting stage. I'm glad to see that attention is still being paid to these issues.

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In doing a quick bit of math, I realized that the environmental justice movement is now about thirty years old. The roots go back further than that, but the movement *per se* came to national prominence as "environmental justice" at that time. There have been victories and there have been disappointments; there have been changes in strategy and changes in recourse to legal remedy; there has been a scientific advancement of our understanding of these impacts in communities of color and poor communities; and there has been an ever-widening sphere of influence that these issues have over environmental policy. So really, setting this groundwork—the legal and historical framework—is a pretty big task and there isn't sufficient time to do it justice. I could recite the milestones, but that doesn't tell the real story either. For a generation of new law students who may want to work in this area, I think doing that would miss the flavor of this remarkable endeavor. So instead, I'm going tell the story of the environmental justice movement and pepper it with some of the memorable people in it, as well as the landmarks that some of us may be more familiar with. I hope that I can do so in a way that imparts what this journey has been like and why, in particular, the legal developments are so important.

Imagine isolated community groups throughout the United States, each in its own way trying to address a variety of problems. Imagine communities living at the fence line of big industrial complexes, too near large transportation corridors, near mining, oil, and gas extraction activities, near animal factory farms. Imagine communities that are impacted by contaminated land, poisoned aquifers, degraded waterways, deteriorated rangelands, and other types of assaults upon their environments. On one end of the spectrum, you have communities from remote Native American reservations and desert areas, and on the other end of the spectrum, enclaves in congested industrial areas of our inner cities. Respiratory ailments—too common. Unexplained rashes, cancer clusters, birth defects. And then you have quality-of-life issues: unbearable odors, noise, dust—and fewer environmental amenities like parks and open spaces.

At first, each of these individual problems seemed local and isolated, but eventually it became apparent that they were all part

of a national pattern. People with very different backgrounds and different cultures got together, and they began to compare conditions and find commonalities. They thought deeply about how they would work together and move forward together. But crossing cultural, geographic, world-view lines wasn't easy. Here you see the first wave of activists: Dana Alston, Damu Smith, Deeohn Ferris, Vernice Miller, Pam Tau Lee, Tom Goldtooth, Richard Moore, Ruben Solis, Gail Small, Jeanne Gauna, Jose Bravo, and many others. They came together in the early nineties to very intentionally draft, debate, and ultimately adopt the principals of environmental justice. That was at the first National People of Color Environmental Leadership Summit—a gathering that allowed the movement as a whole to take shape.

At the same time, within the larger environmental policy sphere—which was occupied largely by conventional environmental groups, business interests, and governmental agencies—there was this assumption: people of color and the poor really don't care about environmental problems. And if these people have a problem, well it is because they moved to these areas because land was cheap and so it is just "the market." And if these people made a fuss, then they were put in that category of those NIMBYs, those not-in-my-backyard folk. Within this arena, conventional stakeholders were not used to dealing with these communities, and so not surprisingly—at this early stage—exclusion, and sometimes outright hostility, were not uncommon occurrences.

That was the flavor of this earlier time—when you see the first landmarks of environmental justice begin to emerge, with direct action strategies like the big 1982 demonstrations in Warren County. That is perhaps the earliest and the most prominent example, but there are others. It was a real up-hill battle. Few resources, no real law addressing environmental justice *per se*, a mountain of anecdotal accounts of the conditions that people were experiencing, but little in the way of the kind of hard empirical evidence that regulators and judges like to see. Academics and lawyers began to get involved in this effort: Bob Bullard, Beverly Wright, Paul Mohai, Bunyan Bryant, Charles Lee, Luke Cole. They really laid the important groundwork for the empirical and legal work that was to follow. You had people like

Wilma Subra, who did a lot of on the ground chemical testing. In the legal academy you had people like Professor Richard Lazarus, and others, who began to write about the way that the implementation of environmental law itself helped to perpetuate these inequities, albeit unintentionally.

In those days—I have to say—there was a lot of energy, a lot of hope. There were long meetings followed by late night sessions. In conferences, often crowded in someone's hotel room, there would be groups of people talking about all of the issues and how, with such pitifully few resources, they could move forward in a sensible way. There were frustrating times and really funny times. Richard Moore tells this story—now, I wasn't there personally—but he tells this story about some activists getting intentionally locked out of the elevators at the EPA headquarters. He describes how you had all these out of shape but totally ticked-off people trudging up the stairwell. The way that he tells the story is hilarious, and I'm sure that over the years it's been embellished just a wee bit. But this much I'll tell you, I would not have wanted to be the agency person at the end of that little trek.

Lawyers and academics, us eggheads, were spared no mercy. You just had to check your ego, and often your dignity, at the door. I have a cartoon penned by Carlos Marentes, who is a wonderful caricaturist. We were sitting at a long meeting, and he passes me this sketched picture of me. Well, suffice it to say it's not a very flattering portrait. At another meeting I was sitting by Luke Cole, who spontaneously started scribbling madly, and then he passed to a few of us a really, really irreverent poem. We started giggling, and the people at the head of the table glared at us, and we got into trouble. A couple of times, again to relieve the tediousness of a really long meeting or otherwise provide comic relief, someone would pen an outrageous, fictitious press statement, stating therein what he or she would *really* like to say. Jose Bravo, in particular, was an incorrigible practical joker, and *nobody* was spared from his creative prankstering.

So, as serious as it all was, in a lot of ways it was just a lot of fun. Several of these people, Damu, Dana, Jeanne, and more recently Luke, have tragically passed on, and we miss them. But others remain. They're white haired now, and still soldiering on.

But I digress; back to the thread of my story. Around this time the empirical evidence started rolling in. The first was a landmark study by the United Church of Christ Commission for Racial Justice, *Toxic Waste and Race in the United States.* Professors Paul Mohai and Bunyan Bryant subsequently undertook a comprehensive literature review and compiled a book with the important findings in this area. Findings that, at that time, were in various places, probably on shelves gathering dust. Looking at these studies in the context of a charge of "environmental racism" got the attention of many. In the academic circles, this sparked a round of vigorous debate about methodology, but all of this was good because it led to refinement of the methodology and further study. Those subsequent studies largely tended to confirm the findings of the earlier ones. It became fairly well established that there is a significant racial dimension to environmental disparities, and there is a class dimension as well. Part of what we are also dealing with here is historical discrimination in zoning and land use, and also current siting criteria that then relies upon, in part, the legacy of those practices. We have also come to understand that demographic shifts and conditions that weaken informal social structures are part of this complex mix. And yes, at times, there are decisions, straight up business decisions, that take advantage of people in weaker positions. But more often than not, there are well-meaning industry, agency, and governmental actors that are making decisions without a full appreciation of the potential for these kinds of disparities.

The direct action campaigns, a lot of community organizing, and empirical work led to another landmark: the 1994 signing of an Executive Order on Environmental Justice by then-President Bill Clinton. This order ushered in a suite of regulatory responses at the federal level. To be sure, those regulatory responses have waxed and waned over the subsequent years, but these early efforts have begun to bear fruit recently; I'll pick up on that thread in a minute.

But first, I want to consider another development that was heating up around that early time. Lawyers got busy and started to sue. The earliest lawsuits, based on the Equal Protection Clause of the U.S. Constitution, were almost always unsuccessful,

largely because of the evidentiary difficulty of proving discriminatory intent. There was a greater measure of success in suits under the environmental statutes. At the EPA, for example, the Environmental Appeals Board began to take seriously the executive order on environmental justice and strongly endorsed the use of an environmental justice analysis in permit proceedings.

But the more high profile legal remedy was Title VI of the Civil Rights Act of 1964. Now, this remedy was particularly important for a couple of reasons. First of all, a civil rights claim resonated with what these communities were experiencing. Instead of debating the technical requirements of the environmental laws, this claim spoke directly to the racial impacts that many believed were engineered—or at least exacerbated—by the methods and criteria being used by state environmental regulators in continuing the practice of issuing, and reissuing, permits to emit pollutants in areas that already had too much pollution. The remedy in this context was for federal agencies to withdraw funds from some of the state permitting agencies and importantly, at that time, there was also the legal ability to institute a lawsuit asking a court to enjoin some of these practices. So it was a potent legal tool, and communities began to put a lot of hope into this Civil Rights law.

The Environmental Protection Agency, one of the major funding agencies, was under a huge amount of pressure from state regulators and the regulated community, who stood to be significantly affected by what state regulators were being asked to do—i.e., stop issuing permits to pollute in highly-impacted communities. It was a volatile time. And so in the late 1990s, EPA convened the Title VI Federal Advisory Committee. I was on that committee, and through this work I came to appreciate what a legally and factually complex area this is. There are no easy answers, one way or another. But just to give you a sense how high the stakes were back then, so great was the controversy that there were congressional riders on appropriation bills precluding the EPA from using appropriated funds to investigate these types of Title VI claims.

Then, in 2001, the Supreme Court in the *Sandoval* decision cut off a private right of action under Title VI for disparate impact

regulations. For communities this was a huge disappointment because it left only EPA administrative investigations as a possibility under Title VI. From the perspective of many communities, EPA has failed them in this regard. It has allowed claims to languish for years, and it has dismissed a lot of those claims. Many believe the EPA has been too quick to dismiss a complaint on grounds that are too nit-picky and technical. Certainly from an environmental justice standpoint, the statistics on these administrative claims are pretty dismal.

But the positive part of the Title VI saga, I think, is that it did get people with very different perspectives at least talking to each other. And the participants, both the participants on the advisory committee itself and EPA personnel, began to visit impacted areas throughout the country and began to appreciate in a very real way just what these communities were facing every day. Unfortunately, people move on from their positions in agencies and in law firms, and I think a lot of the visceral value of this education has been lost over time.

But at this point in the story, circa the century's turn, we have advocates faced with bad case law, and facing a federal administration that wasn't sympathetic to environmental justice and was unwilling to tackle these issues in a big way. Although there were individuals within the agencies that were committed to environmental justice and continued to do what they could do, by and large there appeared to be a standstill at the federal level during this time.

Interestingly, the states then became the innovators. We saw the enactment of a few state laws, like those in California, that deal quite explicitly with environmental justice, as well as state gubernatorial orders on environmental justice. We began to see a range of regulatory initiatives, some state rulemakings explicitly dealing with environmental justice, and helpful case law. In short, throughout the first decade of 2000, a lot of activity at the state level, not so much at the national level, where the issue of environmental justice lost its visibility.

That might be changing. Recently, we've seen some interesting developments. The EPA, in particular, is for the first time attempting to move environmental justice "upstream" in environmental regulation. It's high time. The usual order of

business was to address environmental justice, if at all, at the tail end of regulatory activity, like in a permit proceeding or in an enforcement action—at a point where there are sunk costs and fierce resistance. Now, we are starting to see more attention to these issues at an earlier time, in the standard setting arena, at the rule-making level, and within a new generation of strategic plans. Now we've seen those plans before, during the Clinton administration, but perhaps strategic planning can now get at environmental justice issues in a more sophisticated, innovative, and more effective way than those earlier efforts. For example, I was recently on an EPA work group that was looking at screening tools, in this case it was the "Environmental Justice Smart Enforcement Assessment Tool" (EJSEAT), a method that uses nationally consistent databases to systematically and uniformly identify broader areas of environmental justice concern. At the federal level, you can't screen with ideal resolution, however, because you are not able to use local land use data, it's an important start in addressing environmental justice issues in a more comprehensive way.

There are also attempts to make information about environmental conditions more readily available to impacted communities, and in a more understandable form. Recently, for example, there was a "TRI training conference" for communities to use data from the Toxic Release Inventory to help them better understand the pollutants that are being emitted in their areas.

I believe these small steps, in the aggregate, will help us refine what this technically difficult thing called "an environmental justice analysis" is going to look like. Now, for some of us, this may seem like a very odd concept: identifying communities of concern? We've been to the industrial areas of Chicago, the Wilmington/San Pedro area in California, the petro chemical corridor that runs through part of Louisiana. You know it when you see it. It is pretty obvious that these are environmental justice communities. But to be fair, the reality is that in a lot of instances, it is not so obvious. There are communities in the West and the Southwest that have severe groundwater contamination, and some Native American communities are still experiencing the legacy of very bad uranium

mining practices. These communities don't look like they might have a problem, so it's not as easy as it may seem.

You need good tools that will allow agencies to identify problems with greater precision, so that regulatory action is supportable. You need a legal framework that will provide adequate authority and allow for better regulatory guidance. You need a process to work out these issues in ways that fairly considers the interests of everyone involved. You need to refine and convey information in an understandable and useful form to impacted communities. But most importantly, you need people who are willing to come together in good faith to try to alleviate some of these conditions. You need people who won't get derailed from this task because of the bottom line or because it becomes too politically difficult to do so. Simply put, you need people who are willing to do the right thing in all of the little corners we happen to be working in.

Whether we will really solve this problem still remains to be seen. These conditions are remarkably persistent. We need conviction and vision, and talking about ideals is critically important because it orients us and helps keep us inspired. But you know, there's an awful lot of detailed hard work that needs to be done. This is where a new generation of organizers, empiricists, public health workers, lawyers, and public servants are being handed the torch. Today, we only have to take a look at our program, and we'll see that this symposium is very, very much a part of this effort.

So for the students in the room, my hope is that some of you will decide to work in this area. It is interesting and rewarding, and sometimes it is a lot of fun. I hope that some of the attorneys here, whether you are in government or private firms, will use this symposium to think about ways that will help us move beyond "minimizing the controversy" or "containing the issue" and together figure out how to approach these problems in a way that has a better chance of actually changing conditions on the ground. We need to do that. These communities have been waiting a long time.

Thanks for listening. I hope I have imparted a glimpse of the wonderful humanity that is behind this remarkable endeavor.

Again, whatever little part in this complex drama each of us plays, we need to seize upon that and move forward together.

JEWELL HARPER*

Good afternoon. It is indeed a pleasure to be here today to talk to you about something I am obviously very committed to, environmental justice. I am here to bring you greetings from EPA Region 4 Regional Administrator Gwendolyn Keyes Fleming. Our RA would love to have been here. This would have been her first opportunity to talk on the topic, solely on the topic, of environmental justice. She's very passionate about that. But she had a family emergency last week that has forced her to stay pretty close and she'll have to do that for a couple more weeks. So, things are going well, but family has to come first in this instance. I'd like to also thank Mr. Stephen McKinney for extending the invitation to our regional administrator Gwen Keyes Fleming. Again, she is very sorry that she can't be here. In her previous career, Gwen always kept community engagement at the top of her priority list. I don't know if you all are aware of the fact that she is the former district attorney for Dekalb County in Georgia, which is just outside of Atlanta. And it's a huge county. She basically, on almost a daily basis, had some form of community engagement as a part of her efforts as district attorney with regard to more than 740,000 people in that county. Then and now, she spends a good deal of her personal time engaging with the community and being interactive in a number of ways. Any opportunity for a conversation with the community on issues of concern to the community are very high on her list, particularly those such as the ones that are taking place at this symposium today.

Under the leadership of administrator Lisa P. Jackson, EPA uses three basic principles as guidelines for undertaking discussions. EPA keeps science as the backbone of all of its decisions and programs, it follows the rule of the law, and it maintains that its actions must be transparent. And obviously, all of those have a role with regard specifically to the issue of

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environmental justice. These guiding principles also shape the implementation of the agency's current seven priorities, those priorities being: taking common sense modest steps that will yield measurable reductions in carbon pollution, updating air pollution standards, cleaning up our communities, assuring the safety of chemicals, protecting America's waters, building strong state and tribal partnerships, expanding the conversation on environmentalism and working for environmental justice. And particularly it's that last principle, that last priority, that I want to focus on.

As part of her administration, regional administrator Keyes Fleming is placing a renewed focus on communities that have been underserved or underrepresented in the past. These include environmental justice communities and sensitive populations, particularly those in pockets of poverty that are located throughout the southeastern United States. We recognize the active environmental justice communities in region 4 that have been overburdened by environmental hazards that have driven away economic growth and brought fear about disparate health impacts to these citizens. Now is the time to give these communities a seat at the table, to retool and strengthen the health of these communities in order to decrease associated healthcare costs and to increase opportunities for sustainable tax base. In her first six months on the job, regional administrator Fleming has identified several avenues of engagement for the region with communities. First, she's gotten out on the ground to engage stakeholders at all levels through congressional visits, state commissioner meetings, local commissioner and executive meetings, tribal meetings, environmental justice community listening sessions, regulated community listening sessions, and discussions with academia. These represent a snapshot of her commitment to expanding the conversation on environmental justice. Second, she wants to engage in these 360-degree discussions to ensure environmental justice principles are effectively communicated to all of EPA's external partners. Environmental justice is defined, and I'm repeating something that an earlier speaker said, is defined as the fair treatment and meaningful environment, and I repeat, fair treatment and meaningful involvement, of all people, regardless of race, color,

national origin, or income as the administration develops, implements, and enforces federal laws, regulations, and policies. What does this mean to EPA in region 4? It means that region 4 will ensure that we have a meaningful relationship and honest conversations with states and environmental justice communities. We will accomplish this through prioritization of our efforts, transparency of our actions, proactive engagement of all stakeholders, enforcement, and integrating environmental justice across all of our programs. Third, by incorporating regional administrator Fleming's elements we in the region will broaden the conversation on environmentalism and bring environmental justice communities to the table as partners. Most importantly, EPA will work with these communities to ensure that our children can benefit from an environment that is the same or better than what we have. To do so is to promote sustainability. Native American communities have a saying that I like to repeat, which is that "We do not inherit the earth from our fathers. We borrow it from our children." That so succinctly states what sustainability is and, in addition, it's what we all want. We want our children to be able to breathe clean air, drink clean water, and to play, work, worship, study, and live in a safe environment.

I'd like to spend a couple of minutes outlining EPA's national environmental justice plan. Expanding the conversation on environmentalism and working for environmental justice is a priority that's been included in EPA's strategic plan for the years 2011 through 2015. And in accomplishing that effort, EPA has developed a plan, EJ 2014, an overarching strategy for EPA to integrate environmental justice into its programs, policies, and activities. To accomplish the goals outlined in EJ 2014, EPA developed nine draft implementation plans which will guide the agency's actions in the areas of rule making, permitting, compliance and enforcement, community-based action, administration-wide action, science, law, information, and resources. To just briefly touch on each of these, the first one is incorporating environmental justice into rule making to better protect human health and the environment for overburdened populations. The second is considering environmental justice in permitting to enable overburdened populations to have full, meaningful access, to permitting processes—i.e., a seat at the

table. Thirdly, advancing environmental justice through compliance and enforcement through case targeting, program planning, and meaningful remedies. Fourth, supporting community-based action programs by building useful, productive partnerships that promote healthy, sustainable, green communities. Also, fostering agency-wide action to diminish disproportionate burdens by federal action and to foster positive public health and economic health for environmental justice communities and indigenous peoples. The last four of that group of nine are all tools that are being developed in four different categories. The first one uses science, and the idea is to use data and analytical tools to develop and conduct research in a way that invites all communities to be engaged in understanding and communicating workable solutions to our combined effort to eliminate environmental injustice with regard to health disparities in minority and low-income communities. The second one of the tool group is law, and that involves providing legal support to EPA policy makers in the process of advancing environmental justice objectives. The third of that group involves information, which you heard about earlier today, which is designed to develop a number of things. One of which is a national environmental justice screening tool that will be used across the board, and this will be done within the next three years. One thing I forgot to mention with regard to the science—the data analysis, etcetera, and the research—that is to be conducted within the next five years. So these are more immediate in terms of actual items that we want to focus on with regard to EJ. And last, resources, the tools to develop resources, to develop effective financial and technical assistance to communities working to improve with regard to health disparities.

So what else is needed? EPA needs you. And I mean you, and the ubiquitous you as well. We need to have comment on the *EJ Plan 2014* and that opportunity still exists. Comment is still being taken, you can access the plan at regulations.gov and comment will be taken through April 29, 2011—i.e., through the 29th of this month at regulations.gov. I recommend, please, you comment, if you have commented, comment some more. If you know people, encourage them to comment because the more input we have the better a job we can do. Secondarily, EPA needs feedback from

communities, from you, from everyone, from citizenry on how effective our EJ programs are and what we can do to improve.

I want to close with a quote that was given to me by regional administer Fleming and it's basically one which embodies the principles that she adheres to with regard to environmental justice. Dr. Martin Luther King, Jr., postured this concept of equality in describing his own dreams, and I quote: "A dream of equality, of opportunity, of privilege and property widely distributed. A dream of a land where men will not take necessities from the many to give luxuries to the few." That's how environmental justice plays a role in everyone's daily lives. Everyone wants opportunity, the opportunity to make the community they live in, to make certain that it has the same benefits and luxuries of the community that's fifteen miles across town, the opportunity to show that a low-income minority community does not equate to a low priority community. That's why we have to educate, educate, educate in order to elevate. Finally, I'd like to say please know that EPA Region 4 Regional Administrator Gwendolyn Keyes Fleming is an advocate and a sincere champion for environmental justice. She, and therefore we—the rest of us in the region—are definitely here for you and for everyone else in the country when it comes to environmental justice matters. Thank you very much.

Daria E. Neal*

Thank you, Steven, for your introduction, and thank you ABA for asking me to come here today. I am so happy that I was able to participate in this wonderful symposium on environmental justice. Almost all of the speakers today are environmental law experts and probably most of the lawyers in attendance are environmental law practitioners, but few civil rights attorneys. I'm happy to be here to represent the civil rights enforcement role in achieving environmental justice.

From the time I've been at Department of Justice, which has been a very long six months, I've come to realize the extent to which the work that we do implicates environmental justice issues, and the role enforcement of Title VI of the Civil Rights Act of 1964 is not often well-understood. Today is a great opportunity for me to highlight what the Civil Rights Division is doing and what broad role we can play.

Before continuing, I want to recognize Nicholas Targ, Benjamin Wilson, and Quentin Pair who are the co-chairs of the ABA Subcommittee on Environmental Justice and Diversity. The subcommittee was started over six years ago, about when I first met that trio of amazing men who, in many ways, are responsible for the advancements that I've made in working on environmental justice issues.

As was mentioned, I do have ties to Mississippi. In my previous position at the Lawyers' Committee for Civil Rights Under Law, much of my work focused on the Mississippi Gulf Coast, post-Hurricane Katrina, and working with the Turkey Creek community and the North Gulfport community. We coordinated the National Commission on Environmental Justice on the Gulf Coast. Bishop Black, who spoke earlier, was one of the commissioners. Charlotte Keyes, who you also heard today, spoke before the commission.

Having this discussion here at Ole Miss, a place that is so rooted in our history of civil rights, makes this a very special

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program. I think this institution is symbolic of the challenges that we have as a country in addressing issues of racial discrimination and the impact of segregation; the environmental justice movement is born out of that same history. I'm pleased to see the recognition of environmental justice within this institution and to have the students here learn more about environmental justice concerns. One thing that we do know is that over 75% of hazardous waste facilities are located in minority and low-income communities and that people of color and indigenous communities, as well as low-income communities, bear a disproportionate burden of environmental hazards. So often we think of addressing environmental justice in very theoretical terms, and what the law can and cannot do, and really miss what it means to real people day in and day out.

We've heard about the Gulfport, Turkey Creek community being founded by freed slaves after Reconstruction. It is still there today, despite numerous hurricanes and environmental threats. That community is trying to preserve its history and has worked adamantly to preserve surrounding wetlands. One would not think of wetlands preservation as a civil rights issue, but here is a historic community that was established over a century ago and encapsulates the civil rights struggles of this country; a community that could potentially be wiped away in the next big hurricane if we don't ensure that the basic natural flood protectors that wetlands provide are preserved. So you have environmental activism with the goal of protecting a community that is very much rooted in our civil rights history.

Forgive me as I digress, but we have a group of students here today and I want to speak to them for a minute. I teach an environmental justice seminar at Howard Law in Washington, D.C. So often we have students that are interested in a broad range of issues. They're not just planning to be community advocates, but are planning on working for corporations, or becoming politicians, and are trying to understand what environmental justice means to them and their professional goals. What I and my co-professors, Quentin Pair and Benjamin Wilson, often talk to students about is approaching your work with an environmental justice lens; with an understanding that communities have a voice and that their voice should be valued.

And I think that outlook is critical no matter what role you play in your career, whether you are the activist, a corporate attorney, or an academic. Understanding the history of communities and the impacts that our actions can have and taking that understanding into your representation is really critical to addressing environmental justice needs throughout the country.

Currently, I'm working in the Civil Rights Division of the Department of Justice. The wonderful thing right now about working in the Civil Rights Division is the mandate that we have to address environmental injustice and the commitment that the President of the United States and the Attorney General have made to environmental justice. I want to highlight a couple of recent activities that demonstrate this commitment that you may not hear about. We talked earlier today about the Inter-agency Working Group on Environmental Justice that was formed as a result of Executive Order 12898. The Inter-Agency Working Group has been reinvigorated. In September 2011, there was a White House meeting of the principles of all of the federal agencies. And not just those agencies that are named in the Executive Order, but others that are not, most notably the Department of Homeland Security. The agencies came together to discuss what federal agencies can do to develop environmental justice strategies to ensure that their programs and policies do not have a discriminatory environmental impact on communities of color and low-income communities. This was a really important meeting because it wasn't just about having a conversation about environmental justice, but it really spurred action. Three months later there was a White House forum on environmental justice where approximately 100 stakeholders were invited to talk directly to representatives of the federal government. This was an opportunity to engage the federal government; for stakeholders and community activists to really engage the federal government, hear what different agencies were doing to address environmental justice concerns, and to make community issues known. It is not just EPA that is on the forefront of addressing environmental justice, but Department of Homeland Security. We know the environmental and health impacts of natural and man-made disasters are greater on lower-income communities. So the fact that you have an agency that wasn't even in existence at the time

that the Executive Order was drafted, willing to commit itself to the mission of the Executive Order and to the inter-agency working group, is quite notable.

Within the Department of Justice, the Civil Rights Division, as well as the Environment and Natural Resources Division, have recognized that you can't just address environmental justice in a vacuum, that it requires not only collaboration with community organizers and the private bar but also across agencies and within agencies. And so within the Department of Justice, the Environment and Civil Rights Divisions have begun having conversations about how our work might be able to come together. Some of the first steps that we've taken have included travelling together down to Atlanta and engaging in a listening session. The assistant attorney generals of both divisions travelled to Atlanta and met with the EPA Region 4 administrator, the U. S. attorney, and regional advocates. Our group visited the English Avenue/Vine Street community. We listened to residents' concerns which, most notably, focused on the issue of sewage overflow. We could see the ditches where sewage flows during a rain event and could see the houses with mold growing on them. I don't know if any other assistant attorney general has ever done that—so I can't say that they were the first—but I can say that the commitment to environmental justice is not just talk. The fact that the AAGs were able to observe the environmental impacts on this African American, low-income community really is going to inform how they look at their work going forward. So we are not operating just in a vacuum or in some theoretical sense. They will remember what they saw in Georgia.

Within the Civil Rights Division, I focus mainly on enforcement of Title VI of the Civil Rights Act of 1964, which prohibits discrimination in federally funded programs. The challenge with Title VI enforcement is that each funding agency is responsible for enforcement in their funded programs. When there is a complaint of discrimination in a program or activity receiving federal funds, the complaint goes to the funding agency. More often than not, what would be considered an environmental justice complaint would not come directly to the Civil Rights Division. It would likely go to the Environmental Protection Agency, or Department of Transportation, or the Department for Housing

and Urban Development; but the unique role that the division can play is that we are able to provide assistance to the various agencies when it comes to their Title VI programs. In that role, we have actually been working very closely with the Environmental Protection Agency to implement best practices for their Title VI programs. I think many of you may know about some of the very challenging issues that EPA has been dealing with over the years with their Title VI program; we see it as our role to provide the tools needed to improve not just that agency but any agency that really needs to strengthen its Title VI program. The impact of the Supreme Court decision in *Alexander v. Sandoval*, which eliminated a private cause of action to enforce agencies' disparate impact regulations of Title VI, was devastating to environmental justice advocates. Now agencies are at the forefront in ensuring that the programs that they are funding are not having a discriminatory impact. Many agencies just don't have the resources to address the number of complaints that they receive. Our office is able to, at the very least, provide technical assistance to agencies. In fact, many agencies have actually reached out to us to address some issues within their Title VI program.

The Civil Rights Division has worked with the Department of Homeland Security to address the impact of emergencies on lower income communities and limited English proficient individuals. Title VI prohibits discrimination on the basis of race, national origin, and color and the Supreme Court held in *Lau v. Nichols* that protection against national origin discrimination includes protection of limited English proficient individuals. When you have a disaster like the BP oil spill, you need to be able to communicate with people in order to help them.

The division also actively communicates with advocates. I've had several meetings with advocacy groups on a variety of environmental justice issues, whether it's related to transportation equity or addressing a backlog of Title VI complaints. Before I joined the Justice Department, I was on the other side of the table sitting there with Eileen Gauna and others speaking to federal agencies on a range of environmental justice issues. I think the Department is making great strides in being accessible to communities, learning about the most pressing issues, and trying to figure out how we might be able to help

within our limited role. The Environment Division has also been very much engaged and is reaching out to communities in ways that they have not done so before. The hope is that these efforts to address environmental injustices are sustainable. The Environmental Justice Interagency Working Group is working with that mission in mind. The Civil Rights Division, as well as the Environment Division, are moving forward in that direction and are working with other divisions within the Department of Justice. Our Community Relations Service, which is primarily focused on being a peacemaker in working with communities that are dealing with a variety of issues involving racial tensions with police departments and local officials, is incorporating environmental justice in their work.

So what can you do as private practitioners and as law students? Law firms are in a very unique position to be able to provide pro-bono services to communities that may not be able to afford legal representation. Whether it is assisting with the comments on a proposed permit, challenging the expansion of a landfill, or explaining the administrative process to a community group, law firms and law students can play a very important role in trying to spread information about environmental protection, civil rights, and the public participation process. So please consider pro-bono opportunities.

I am truly optimistic about what I see happening within the Department of Justice on environmental justice. The work that's being proposed is with a long-term vision, to not recreate the wheel by building on the great strides made during the 1990's. We don't want the progress we make to be reversed by any particular administration. There will always be an administration that is friendly or not friendly to environmental justice issues. But when we look at what underlies the main concerns of communities (fair treatment, equal treatment, and environmental protection that actually protects communities), and if we approach our work with that in mind, it should not matter who's in office; the work will be able to sustain itself.

Thank you again for inviting me to come speak today and, again, I really appreciate the opportunity to be here.

MALCOLM D. JACKSON*

Well, hello. Good morning everyone. I am very excited to be here participating in this symposium and discussing this important topic. I think this is something that is very relevant, for me, from the perspective of I actually grew up in some of these EJ communities. And the other piece of it, just being here at Ole Miss, as you've heard I graduated from Jackson State University. That's where I got my undergraduate degree. But I used to come up here from time to time and I haven't been on this campus in over thirty years. It's improved quite a bit. This building wasn't here, of course, and I see so many improvements here and I'm just happy to see all the improvements here and be back in Mississippi. I don't get to come back very often, now, being in Washington, but it's just good to be back here.

What I thought I'd do is, I want to quickly talk about the Environmental Protection Agency at a high level. And then I want to talk about what my role is and you've heard some my panel members talk about information and you'll see in a few moments how that ties into what I do. And then I'll talk about my organization and what we do. And this organization, I have to tell you, I just feel very privileged to be able to lead it here at EPA.

To begin with, EPA is led by administrator Lisa Jackson, who is an amazing person. She brings a tremendous amount of experience and passion to her role. It's the mission of EPA to protect human health and the environment in which we live. Now you might ask, what does that mean? Well, we ensure that the air that you breathe is clean, that the water that you drink meets certain quality standards, and the land you live on is free of pollutants. The agency accomplishes this by setting environmental rules and regulations which corporations and organizations and individuals must comply with. A company complies by providing environmental data to a state environmental agency, which reports its information to EPA. Here in Mississippi, your state

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environmental agency is the Mississippi Department of Environmental Quality, which is led by Ms. Trudy Fisher and we're fortunate to have her here today participating in this event.

I am the assistant administrator for the Office of Environmental Information and the agency's chief information officer. In this role, I manage the toxic release inventory program and I serve as the information technology leader for the agency. My organization, the Office of Environmental Information, or OEI, supports the agency by integrating high-quality environmental information to make it useful for decision making, analysis, and measuring success. OEI's mission crosses all of the agency's offices and programs. We're responsible for bringing data into the agency from a variety of sources, ensuring data quality, access, integrity, and making strategic information technology investments. To successfully fulfill our mission, OEI must manage a variety of environmental information databases and information resources as well manage the information technology hardware and software that enables us to conduct our daily operations. Thanks to the technology advances of the past decade, we've made enormous strides toward delivering seamless reporting data and providing improved access to the agency's many valuable information resources.

One key point we're focusing on here today is the advance in information availability. At EPA, we're leading the federal government by increasing the availability, usability, and relevance of environmental information. We're improving the two-way flow of information to increase overall information transparency. We're committed to providing widespread access to information and increasing public participation, and we're equally intent on removing information barriers from overburdened communities.

Raising awareness about potential environmental hazards is an essential component of environmental justice. Environmental justice is a cornerstone for the agency. EPA defines environmental justice as the fair treatment and meaningful involvement of all people with respect to development, implementation, and enforcement of environmental laws, regulations, and policies. This will be achieved when everyone enjoys the same degree of protection from environmental and health hazards, and equal

access to decision-making processes to have a healthy environment in which to live, learn, and work.

EPA understands that communities need effective tools and information to help them better understand the contextual connections between environmental efforts and health risks. To this point, EPA is in the forefront of providing such information through resource tools and making them useful and meaningful for overburdened communities. I'd like to tell you a little about the tools we've created in support of environmental justice concerns. One of the EPA's largest successes has been its premiere community right-to-know program, called the Toxics Release Inventory—or TRI for short—which just happens to be run out of my office. TRI provides communities with information about toxic chemical releases and waste management activities in order to support informed decision making in all levels of government, non-government, industry, and the public. TRI data is submitted by regulated facilities each year and is added to a database that contains detailed information on disposal or other releases of over 650 chemicals from thousands of U.S. facilities. In recent years, I'm proud to say that we've greatly increased our ability to provide the public with accelerated access to the TRI data. And we've substantially improved the quality and accuracy of the data by employing a wide assortment of electronic online information tools.

Also, EPA has created a number of electronic tools that provide a variety of ways to access and analyze information about national and local trends in toxic chemicals, and disposal or releases to the environment. In particular, I'd like to call to your attention a tool called "My Environment." My Environment is a particularly good starting point to learn about the environmental conditions of communities simply by inputting a zip code or a city name. This tool helps people learn about the quality of the water and the possible presence of toxic air pollutants and how different companies might be impacting their local communities. EPA is always looking for innovative ways to make information more readily available to the general public. One example of this is our most recently released TRI tool called myRTK, short for "My Right to Know." This new tool is designed to be used on mobile devices and is becoming very popular among environmental justice grass

roots organizations due to its ease of use and mapping capabilities. Now, imagine if you're riding along on a sunny day here in Mississippi with your window down, and you suddenly become aware of a smell coming from an industrial plant along the highway. You might want to know what kind of manufacturing process would result in such a bad smell or what kind of chemicals are being disposed of. Now, all you have to do is pull out the myRTK tool and you consult your mobile phone and find out more about it.

To consider particular environmental justice concerns, EPA provides a wide range of analytical and mapping tools to help overburdened communities understand environmental health impacts in their neighborhoods. EJ View is one such tool that allows communities to view environmental, demographic, and health data in their area. Various aspects of EPA's business such as emergency response and environmental reviews mandated under the National Environment Policy Act, or NEPA, are informed by the EJ reports generated by EJ View. Another major asset is EPA's envirofacts database, which supports EPA's stakeholders to query about EPA's regulated facility. Envirofacts supplies answers to questions about environmental compliance and to what extent does an industry comply with environmental regulations and permitting designed to protect neighboring communities who might otherwise be subjected to unregulated levels of pollution in its land, air, and water. And we're always looking into ways to increase our transparency and usefulness of information. In addition to all the agency's electronic information analysis tracking and mapping tools, we've come to recognize the importance of integrating various datasets to cut across typical federal, state, and local government areas of responsibility. Recently, we partnered with the enforcement office at EPA to develop a TRI comparative analysis tool, which allows users to compare TRI information with data from our air, water, and waste programs. And we're working to better engage the public on regulatory activities that may impact their communities. EPA, as an organization, sponsors regulations.gov and is leading the way for the entire federal government to be more transparent using this tool for rule-making activities. Through the use of video, webinars, and other social media tools, we're offering the

opportunity to understand the intent of the proposed regulation and invite input and comment before the regulation is finalized. Specifically, at EPA, we look at this as a way of expanding the conversation on environmentalism, which is a priority of our administrator, Lisa Jackson.

Moving into the future, we're currently looking into ways to better integrate our various EPA managed environmental databases and other information resources. An especially promising means of accessing some information is through an assortment of enhanced online mapping tools. We're investigating opportunities for partnering with other federal agencies to increase linkages with datasets and integrate data from a variety of sources together to ensure that communities can access and use all available information resources that impact the health and environment in which they live. And EPA is committed to developing a common mapping platform and a nationally consistent screening and targeting tool in order to enhance the agency's environmental justice, analysis, and decision making. Just this week, as I mentioned, I was in L.A. meeting with a leader at a mapping software company, looking for ways in which we can come up with common standards at a national level. This effort will make it easier for communities to better understand how EPA screens for potential environmental justice areas of concern. As one of the priority elements of EPA's *Plan EJ 2012*, this is an agency-wide plan focused on addressing environmental justice. Now, when it's implemented, it will further enhance our ability to provide accessible information and foster transparency.

I encourage you to look at these tools and discover what's in your own neighborhood. And use these tools the next time you research geographically-based environmental conditions. In closing, I want to thank you so much for this opportunity to speak to you today about the variety of EPA's information resource tools that promote and enhance environmental justice.

REFLECTION ON ENVIRONMENTAL JUSTICE

*Melissa McGee-Collier**

I have to begin this observation, by asking the question that perhaps has been asked by numerous individuals: What is "environmental justice?" I assert that in order to define environmental justice, one must first have an idea of what environmental *injustice* looks like. Ergo—based entirely on what I have witnessed both as an African American growing up in the State of Mississippi and in my current capacity as director of the Office of Community Engagement for the Mississippi Department of Environmental Quality—I would like to provide a view of what I consider to be environmental injustice.

My childhood home sat across the street from a railroad track where the trains ran like clockwork—and still do I might add. In addition to having the vibrations from the trains literally rock the house, the street we lived on was a highway serving as the main throughway for eighteen-wheelers to pickup and deliver shipments from the several industrial supply companies located less than a half mile up the road. Less than two miles away was the brickyard. One of the main industries in the town—known for the emission of odors from the smoke stacks—sat about one mile away. Less than ten miles away was an oil refinery plant, and less than six miles away was the city landfill. The list goes on and on and on.

Based on the facts that I can see, I would say that the majority of the environmental burden in my hometown was and remains with the African American community. A reality that is true in many African American communities throughout Mississippi. The seemingly common neighborhood metamorphoses into an injustice when the comparison is made between one side of the tracks and the other. Where the African American community

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has industry, emissions, and dangerous traffic, the other community has parks, sidewalks, and grocery stores.

Contemporaneously, there are several questions that need to be asked in order to corroborate environmental injustice: (1) Have there been adverse health effects on populations in the community caused by the exposure to environmental hazards?; (2) Is there an inequitable environmental burden placed on the community?; (3) Have past zoning and land use decisions supported the embedding of industries in low income, minority residential areas?; and (4) Was the community given the opportunity to participate in a public process?

In my opinion, of the questions listed, (2) and (3) are effortless to answer because of the tangibility. The number of facilities in a community is concrete, verifiable, and documented. Zoning records evince where residential and industrial areas collide into a mixed-use imbroglio. Thereby, the answer to both questions is a resounding yes.

Question (4) is probably just as uncomplicated to answer; however, almost certainly more unsavory. This question requires the inquirer to probe into the past years of the discriminatory actions by governmental bodies and to wonder if during the 1950s and 1960s the communities were actively involved in land-use decisions. In the 1970s, one must query the number of these communities included in public participation processes for environmental decisions. Indubitably, the answer to question (4) is no.

Question (1) is the most difficult. The question examines the existence of an uneven geographic distribution of environmental health hazards, and potentially disproportionate exposure to environmental risk in the United States. Does this disproportionate exposure result in racial or ethnic minority and lower-income communities bearing the highest burdens which, in turn, might contribute to the health disparities? After cross-examination, framing and re-framing the question, it is impossible for one to say absolutely that the communities have not suffered from related health impacts. Subsequently, the answer must be yes.

Now What? Two of my favorite words—requiring oneself to discover, disentangle, decipher, and decide the best solution to the

Gordian knot of environmental injustice. I don't have the answer. Truthfully, I don't know if there will ever be a solution to satisfy those who have experienced living in or continue to live in what we now term an "environmental justice community". What I do know is that no one can walk away from the table. The conversations must continue. I encourage everyone to be a part of the conversation.

I leave you with a quote from the profound Dr. Suess: "Unless someone like you cares a whole awful lot, Nothing is going to get better. It's not."[1]

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[1] DR. SEUSS, THE LORAX (1971).

THE MUTUAL BENEFITS OF COMMUNITY ENGAGEMENT

*Stephen Renfroe**

INTRODUCTION

When a company engages the local community in a caring and compassionate manner over a long period of time, the resulting relationships can produce a positive and mutually beneficial outcome—opposite of the problems generally associated with environmental justice. Of course, no amount of community engagement can overcome a manufacturing facility's poor operating performance. But with a foundation of safe, reliable operations, open and honest community engagement can produce enormous benefit for the company and neighbors alike.

Jackson County is Mississippi's undisputed industrial capital. Located in the extreme southeast corner of the state, it is the home of the state's largest employer in Ingalls Shipbuilding and the state's largest single private investment in Chevron's Pascagoula Refinery.

Chevron, originally under the name Standard Oil of Kentucky, was the darling of Mississippi economic development in the early 1960s. The Mississippi Constitution was changed to allow the company to purchase sixteenth section land;[1] and in 1961, Mississippi Governor Ross Barnett helped turn the first shovel of dirt beginning construction of what is today Chevron's largest wholly-owned petroleum refinery.[2]

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* Steve Renfroe retired from Chevron in 2011 after a thirty-five-year career. He is president of the Excel By 5 Board of Directors, a member of the Governor's Early Childhood Education Council, and chairman of the Jackson County Chamber of Commerce Board of Directors. He also works with Audubon Mississippi, the local United Way and Mississippi's Foundation for Public Broadcasting. Steve is currently managing partner of the consulting firm Back Porch Solutions. Steve and his wife Debby reside in Moss Point.

[1] MISS. CONST. art. 8, § 211.

[2] *Chevron Pascagoula Refinery: History*, CHEVRON, http://pascagoula.chevron.com/home/abouttherefinery/history.aspx (last visited Jan. 30, 2012).

Over the past decade, the Pascagoula refinery's community engagement program was defined by two "bookend" education initiatives that targeted potential employees and the very young. In the following few paragraphs, I will attempt to describe these two programs as examples of beneficial community engagement.

I. WORK FORCE DEVELOPMENT

The refinery's nearest neighbors are those well-to-do folks who reside mostly along and near Beach Boulevard, in south Pascagoula. However, over the last forty-five years, residents of Pascagoula and those of nearby Moss Point have, on the whole, become more ethnically diverse and more economically disadvantaged.

At the same time, Pascagoula refinery employees are some of the highest paid in the area, and Chevron jobs are both renowned and desirable. It is common for several thousand eager applicants to apply for no more than thirty operator or mechanic positions. In 1990, almost three-fourths of refinery employees resided in Jackson County, while twenty-eight percent commuted from nearby Mobile County in Alabama. Today, thirty-eight percent reside in Alabama. There are likely many reasons for this demographic trend. Certainly, hurricanes have motivated some to relocate to the higher ground in Mobile County, and improvements in roads over time have made it practical to commute longer distances. Regardless of the reasons, potential job candidates residing nearest to the refinery had to compete with Alabamians, who were not neighbors to the refinery.

Given these trends in both the community and at Chevron, it was reasonable to predict the refinery and its neighbors would become increasingly isolated from each other. This possibility was unacceptable to Chevron, and in 2006, the company took action in support of hometown employee candidates. Chevron partnered with the Mississippi Gulf Coast Community College to establish a new program in petrochemical technology at the college's Gautier campus.[3] Chevron footed the $320,000 bill for laboratory equipment and made refinery trainers available to the program.

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[3] *MGCCC Teams With Chevron on Petrochemical Technology Program*, WLOX, http://www.wlox.com/Global/story.asp?S=5050629 (last visited Jan. 30, 2012).

The college hired two Chevron retirees as instructors, and Chevron provided tuition scholarships and opportunities for summer interns. A news story in the local paper described the program and Chevron ran ads in local media.

The table was set, and—as predicted—the first class of students were all from the local area and very talented. There was one problem: the class had no visible diversity. This prompted Chevron to take the issue to a member of the local African American Ministerial Alliance, and as a result of this meeting, Chevron was honored to accept the pastor's invitation to speak during a Sunday morning service. A member of Chevron's training department explained to the congregation the details of the community college program and how it was closely connected with Chevron's employment process. Chevron also made adjustments to its scholarship program to target minorities. Today, the program has become so successful (and popular) that for the first time in over twenty years the percentage of Chevron employees who reside locally has increased. Chevron and the college are currently developing a parallel program for employee candidates in the important area of maintenance services.

II. Early Childhood Education

While Chevron's focus on workforce training has had a clear impact on local employment, early childhood education has the potential to impact the long-term success of all children, whether they work for Chevron or not. The Pascagoula refinery became interested in early education in 2001 and sponsored and facilitated a planning meeting for early education experts from across Mississippi. From this meeting the idea of a community certification program that promoted early childhood education was born. For the next several years, Chevron worked closely with Mississippi State University's Early Childhood Institute and others to forge a program that was eventually named Excel By 5.[4]

By late 2004, with the support of First Lady Marsha Barbour, a $650,000 grant from Chevron, and a grant from the Phil Hardin Foundation, an Excel By 5 pilot program began in the Mississippi

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[4] *Our Story*, Excel By 5, http://www.excelby5.com/about/ourstory.php (last visited Jan. 30, 2012).

communities of Pascagoula, Petal, West Point, and Cleveland. As defined by Excel By 5, each community identified a lead agency and formed a broad-based coalition that was responsible for meeting Excel By 5 certification requirements. These requirements were grouped in four areas: community involvement, parent training and support, child care, and health.

Excel By 5 certification takes a community about two years to complete. Petal was the first, followed by West Point, and then Pascagoula and finally Cleveland. During the pilot phase, the Walker Foundation approached Chevron and offered to sponsor Excel By 5 in an area of Mid-Jackson where it was already actively involved. Then the Gilmore Foundation sponsored Excel By 5 for all of Monroe County, and with the support of the Kellogg Foundation the Mississippi Center for Education Innovation sponsored a large part of the Mississippi Delta. More recently, the Community Foundation of Northwest Mississippi volunteered to sponsor Excel By 5 in the high growth area south of Memphis.

Today, seven Mississippi communities have attained Excel By 5 certification and about thirty more are in the pipeline. Current Excel By 5 certified communities are Biloxi, Petal, Pascagoula, West Point, Monroe County, Moss Point, and Cleveland. Excelebrate!

Excel By 5 is bringing focus to the importance of early childhood education, and it's growing grassroots leaders who are passionate about supporting young children and their parents. Excel By 5 was recently incorporated as a new non-profit organization, and in 2010, Chevron made a five-year, $750,000 commitment to Excel By 5.

In conclusion, community engagement is an important component to the long-term success of a manufacturing facility. It involves strong relationships built on open and honest communication. It is about getting involved and building trust. It is being willing to listen and respond. Community engagement is mostly about leadership.

COMMUNITY ENGAGEMENT: ONE POINT OF VIEW ON THE EPA'S NEWLY RE-DEFINED ENVIRONMENTAL JUSTICE INITIATIVE & PATH FORWARD STRATEGIES FOR COUNSEL AND INDUSTRY

*Alec D. Van Ryan**

"Common sense is not so common." *Voltaire*

INTRODUCTION

This paper is both a departure and an arrival. A departure in that as I began my career as a journalist I tried to avoid dabbling in the first person . . . and yet I find that perhaps my account of the journey along the environmental justice pathway is best told from my point of view since there are other papers in this collection that may certainly touch more on the mechanics of environmental justice. The arrival is the realization as I pen this Paper of how very far we have come and yet how much road there is yet to travel.

Full disclaimer—I am a consultant working for both counsel and industry. My discipline is helping communicate sensitive environmental issues to publics that in most of my work have already been polarized by the very process that in part is designed to create dialog not discord. Environmental justice has been a significant factor in much of my work over the last twenty years.

I. THE ROOTS

Back in the early 1980s when the Superfund process was beginning to steamroll across the country, there did not seem at that time to be an understanding of most of those involved in the process—from the EPA to the local regulators to the potentially

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responsible parties and defense and plaintiffs' counsel alike—how seriously Superfund could damage a community. Early on, the standing axiom seemed to be along the lines of "We have found evidence of triple ethyl death next to your elementary school . . . we will be back in six months when we know the results and tell you more then." An exaggeration for sure; but not that far off from what I heard time and again in the first public meeting presentations at Superfund sites.

From my point of view as a former reporter, I witnessed the media promoting the story, not promoting understanding. Facts never play as well as fear and concern. And at that time public involvement meant holding massive public meetings with large gaps of time between them. It is easy to understand the disconnect between a parent's genuine concern about their child's health and the agency's need to ensure that all the information to be provided must be complete and vetted before it is released.

So in the early 1980s it really did not matter that much the color of your skin, or your economic standing, because no one seemed to be able to get information about environmental issues. The environmental "injustice" story had already begun, but was not recognized for what it was at that time.

As Superfund sites began to be identified, ranked, and catalogued, it became apparent that a pattern was developing. These sites of significant environmental concern tended to map across the country either encapsulated within or adjacent to minority and low-income neighborhoods. Much is written on this; my role then and now concentrates on the public involvement and therefore the information flow to and from these minority and low income neighborhoods. This is where much was, and is, needed to be learned, and it was the concept of environmental injustice that drove this process.

II. Case Study: The Reichhold Chemicals Superfund Site, Columbia, Mississippi.

Much has been written about this site since it indeed did seem to fit the stereotypical description of a Superfund site where environmental injustice was dominant. The truth is completely opposite of this legend, but even those directly involved in the process were not aware of it at the time—it seemed cut and dry. A

decades old "stump juice" plant located in the middle of a small southern Mississippi town—and adjacent to a low income minority neighborhood—closed down and was abandoned after a fire and explosion. It eventually was listed on the National Priorities List, scored, and became a Superfund site.

A few public meetings were held as required by the process. Misunderstandings and serious gaps in the information process led to genuine concern and division. Then lawsuits were filed and settled. But, polarization and stigma remained.

Looking back, Columbia was certainly not the only Superfund site playing out that scenario; unfortunately it was the rule and not the exception. But it did not stay that way.

It turned out fortuitous for Columbia that, although the Superfund process did initially divide the community, Columbia is a very small town and people traditionally interacted and supported each other regardless of what side of the town they lived on or the color of their skin. The residents had gone to school together, their children played together, but something was wrong in Columbia.

It took some time to see the trees while standing in the forest, but we eventually did. Because the community talked to each other, we began to understand from the community that the public process that was required by Superfund completely missed the mark in Columbia (and other communities as well). The standard operating procedure of placing an advertisement in the local paper announcing a public meeting by government officials who would be coming in from out of town and would share the Superfund process and information with the community sounded great, but fell short on several critical issues. It assumed the citizens of Columbia all would read the paper, understand the importance of the meeting, and come to hear out-of-town folks explain what was going on in their community. It also assumed that everyone in the town would feel comfortable attending a public meeting put on by outside public officials. As one lady in Columbia told me, opening my eyes to this error, "You know in my mother's day, if you were black and attended a public meeting you might not be seen again." We cannot change history, but we can learn from it.

Long story short—Columbia's leadership, black and white, wealthy and poor, pulled together to defeat the stigma of the Superfund site and, through the charrette process supported by winning an EPA Brownfield's grant, got the Superfund site delisted and pulled the community back together under a common vision. That process continues today.

Fast forward to today—Nothing underlines a change in identifying an actionable path forward to help effectively address environmental justice issues more than the EPA's "new" definition of environmental justice—now community engagement. Community engagement is not just a repackaging of the old ways of public involvement; the key and significant difference is active and aggressive outreach and inclusion. One prime key to understanding the "new" environmental justice is encapsulated within the EPA's interim guidance document.[1] The guidance document openly challenges agency staff to incorporate environmental justice into the agency's rulemaking process. Accordingly, EPA Administrator Lisa P. Jackson has set as her personal priority a commitment for all EPA regions to work for environmental justice and protect the health and safety of communities who have been disproportionally impacted by pollution. This may on the surface sound like the standard environmental justice language to date, but it is not.

The key to the new environmental justice (community engagement) was underlined by EPA Administrator Lisa P. Jackson:

> Historically, the low-income and minority communities that carry the greatest environmental burdens haven't had a voice in our policy development or rulemaking. We want to *expand the conversation* to the places where EPA's work can make a real difference for health and the economy . . . . This plan is part of my ongoing commitment to give all communities a seat at the decision-making table. Making environmental justice a consideration in our rulemaking changes both the perception

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[1] U.S. ENVTL. PROT. AGENCY, EPA'S ACTION DEVELOPMENT PROCESS—INTERIM GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF AN ACTION (2010), *available at* http://www.epa.gov/compliance/ej/resources/policy/considering-ej-in-rulemaking-guide-07-2010.pdf.

> and practice of how we work with *overburdened communities, and opens this conversation up to new voices.*[2]

Thus the new environmental justice is no longer simply defined as a component of racial percentages or income divisions. Environmental justice now means real and meaningful community engagement throughout the defined process. No longer are the traditional "we talk, you listen" public meetings the safe harbors they once were in meeting community involvement and outreach standards. And arguably, that would include the public availability meeting format if there was not a real effort behind the planning and execution to actively work so that all factions within the community are represented and have a real opportunity to make a difference.

This commitment is built on an earlier EPA document which set a standard that the primary focus of environmental justice should be: "ensuring that all communities are empowered through information dissemination and education to have a better understanding of the environment and the impact it may have on their health."[3]

The EPA has taken a leadership role in environmental justice; setting a goal for itself to become an advocate and—where regulations permit—an enforcer of these principles. In so doing, the agency has assisted the auditing of potential environmental justice deficiencies by helping to set definitions and guidelines by which methodologies can be developed to research and audit environmental justice impacts, if any, emanating from an action that requires environmental regulatory review and approval. This is unmistakably underlined by the EPA's proposal to list environmental justice as a first-time enforcement priority in fiscal years 2011 to 2013.[4]

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[2] Press Release, U.S. Envtl. Prot. Agency, EPA Releases Rulemaking Guidance on Environmental Justice (July 26, 2010) (emphasis added) (internal quotation marks omitted), *available at* http://www.epa.gov/agingepa/press/epanews/2010/2010_0726_1.htm.

[3] U.S. ENVTL. PROT. AGENCY, TOOLKIT FOR ASSESSING POTENTIAL ALLEGATIONS OF ENVIRONMENTAL INJUSTICE (Nov. 2004), *available at* http://www.epa.gov/compliance/ej/resources/policy/ej-toolkit.pdf.

[4] *See* U.S. ENVTL. PROT. AGENCY, FISCAL YEAR 2011-2015 EPA STRATEGIC PLAN: ACHIEVING OUR VISION (Sept. 2010), *available at* http://nepis.epa.gov/Exe/ZyNET.exe/P1008YOS.TXT?ZyActionD=ZyDocument&Client=EPA&Index=2006+Thru+2010&Doc

For the purposes of this Paper I will focus on what I suggest are the two key and defining public involvement principles of environmental justice; meaningful involvement and equal access to the decision-making process by all people, regardless of race, color, national origin, or income.

III. WHAT DEFINES "MEANINGFUL INVOLVEMENT AND EQUAL ACCESS?"

For the purposes of discussion I believe the following four defining questions represent the basic underpinnings of the new EPA environmental justice guidance for proof of meaningful involvement and equal access:

(1) Have all the publics involved had an opportunity to participate in decisions about activities that may affect their environment and/or health by the proposal?;

(2) Did the public contribution have an opportunity to influence the regulatory agency's decision process?;

(3) Were public contributions and their concerns considered in the decision-making process?;

(4) Did the decision makers seek out and facilitate the involvement of those potentially affected publics?

In a speech before the American Bar Association's Conference on Environmental Law in March 2011, the EPA's general counsel, Scott Fulton, further defined what he was directing the EPA regions to accomplish in the realm of the new environmental justice / community engagement guidance:

- Dramatically Expand Public Participation. Not just words—the public has a responsibility to participate in

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the process in a meaningful, observable, and accountable means.

- EPA has the responsibility to see that the public participation is real and measurable—pre-decision, and post-decision.

- The entity involved in an EPA regulated process, such as permitting an expansion or new sighting, must actively seek and then document changes that have taken place in the process due directly to input from the public through the public engagement process.

Considering the above, what are the possible take-aways from these points and what strategies might assist in meeting these guidance standards? I suggest there are three core steps for counsel and industry to consider:

The first core step is based on the "aim before firing" approach. Some of the most effective strategies I have seen that are addressing these guidance standards have begun with gathering objective "intelligence from the front."

This first step deals with some form of benchmarking, e.g., something akin to a communications and environmental justice audit. This audit, or research sweep, is a benchmarking initiative working to document all past and present communications and outreach strategies employed to date by an industry or facility. But the key to these successful benchmarking audits is a bit different from a file dive and data dump. The genius in a good audit is that it serves to document all past and present communications and outreach strategies *from the community's point of view*. It is not what was said, it was what was heard.

The initial audit process also works to document all the attributes and census considerations in play in the potentially impacted community with particular consideration to those above outlined environmental justice triggers. Effective audits also seek to identify trusted paths of communication within the community. This is more critical today due to the influences of social media and cable news. The factor here is that all publics/communities are not homogeneous and thus trusted paths of communication tend to vary substantially by segment.

The methodology of this audit process generally includes:

- A thorough review of all public project documents and past media coverage.

- Developing a written methodology and conducting on-site, in-person, one-on-one interviews in the potentially impacted communities and with local key audiences to include a "windshield survey" of the potentially impacted neighborhoods. This approach was specifically employed in an effort to benchmark and better define the demographics in the potentially impacted area often missed by just referencing available U.S. Census data.[5]

- This research should also be designed to assist in determining other subtleties that may act as obstructions to information dissemination and involvement (e.g., language or cultural trust deficits that inhibit publics from attending official meetings or participating in a dialog with authority officials).

- If this work is in support of a permitting process, a review of all technical materials prepared in support of permitting (say a proposed facility) focusing on determining the potential for disproportionate environmental impacts. Question: if there are expected to be health and/or environmental impacts, will low income and/or minority communities be disproportionately impacted?

- An *objective and honest* evaluation and assessment of the public involvement strategies used to date. How does the community become informed about and participate in the public elements of this process including inputs to the decision-making process. Is information about the outcomes of these meetings and outreach initiatives made available to the community and how are potential language and technical understanding barriers addressed?

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[5] Another potential driving factor for on-the-ground research was the possible existence of shadow demographics, sometimes in play in areas of high residential turnover or in areas that include large tracts of open spaces.

- Access positioning factors such as the communication of the benefits and burdens associated with the proposed action to all potentially impacted communities.

The second core step is planning: specifically Strategic Community Engagement Planning. The above described benchmarking research tends to support a strategic planning process with both an objective outline of the positives and gaps in the current communications process, as well as demonstrates due diligence in seeking to meet EPA environmental justice criteria. I suggest considering that one key of this planning process is to document all that has been done consistent with the EPA's intent to meaningfully engage the community and, moving forward, provide specific direction to the communications process to keep it within the compliance parameters as outlined by the EPA. Thus, the strategy works to satisfy the EPA requirements and guidance directives, and to avoid triggers and missteps.

The final core step would be to proactively demonstrate due diligence of this process to the regulators and *all publics and stakeholders involved*. By entering this process "eyes wide open" I have found that counsel and clients have traditionally been able to maintain a positive position with the EPA by pre-satisfying the environmental justice process before it is deployed as a requirement by the agency. But perhaps the real co-beneficiaries of this proactive community engagement process are the industry and the community.

Working through this process mirrors the lessons we learned in Columbia, Mississippi. The journey and risks are shared. By inviting everyone to the table—ensuring that they could get to the table and that their input was listened to and respected—opened the door for a very successful outcome in Columbia. It seems that the EPA is setting that standard for future actions to emulate.

Thus, the EPA guidance documents on environmental justice underline that the agency is working to incorporate commonsense into how they approach actions and community engagement moving forward. It is now up to counsel and industry to recognize the importance of this shift from passive to active community engagement, and to take leadership of this process moving forward.

THE ROLE OF INFORMATION IN ENVIRONMENTAL JUSTICE

*David W. Case**

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INTRODUCTION

Environmental justice is the prevalent term used to describe efforts to identify and address disproportionate environmental risks and impacts experienced by low-income and minority populations. Studies conducted over the past several decades "strongly suggest" that industrial sites, hazardous waste disposal facilities, and other pollution generating facilities are disproportionately found in or near low-income and minority

communities.[1] Such evidence indicates that poor and minority neighborhoods, whether urban or rural, have far greater odds of higher exposure to environmental harms and risks than wealthy or affluent areas.[2] The goal of environmental justice is to address and respond to such inequities.

The national environmental justice conversation began in earnest in the early 1980s.[3] Nearly forty years later, the Obama Administration has placed renewed emphasis on this issue and has injected badly needed vitality into the national discussion.[4] Hoping to further this important conversation, the American Bar Association Section of Environment, Energy, and Resources (ABA-SEER) and the University of Mississippi School of Law co-hosted a Symposium on U.S. Environmental Justice and the Law in April 2011. The Symposium brought representatives of academia, government, the private bar, nongovernmental organizations, and the corporate sector to the University of Mississippi School of Law to discuss current issues in the field of environmental justice.

At the Symposium, the author moderated a panel discussion on the topic from which the title of this article is taken. This article seeks to expand on that discussion by examining the critical importance of information to efforts to identify and address environmental justice concerns. This article further surveys important developments in the generation, use, and promotion of public access to information relevant to such efforts, including significant developments which have occurred after the April 2011 Symposium. Because so many of these developments are occurring at the federal level, the focus of this article will be on federal environmental justice information policy and the United States Environmental Protection Agency (EPA).[5]

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[1] Barry E. Hill, Environmental Justice: Legal Theory and Practice 9 (2009).

[2] *Id.*

[3] *See id.* at 9-10 (tracing first protests against environmental injustice to 1967, but noting that the 1982 Warren County, North Carolina PCB landfill siting protests were when environmental justice began to transition from a local issue to a national movement).

[4] *See infra* notes 64-100 and accompanying text.

[5] Although beyond the scope of this article, there is indeed considerable ongoing activity at the state level to increase public access to information to further the goals of environmental justice. For a discussion of some of these efforts, particularly in

Information is—in general terms—of critical importance to environmental law and policy. A robust and effective environmental protection system is not possible if environmental policymakers lack access to necessary information.[6] Information needs are particularly important, and information deficits particularly acute, in such areas as pollution control, natural resources management, and regulation of toxic substances and hazardous wastes.[7] Environmental regulators cannot effectively regulate without access to information about activities that adversely affect human health and the environment. Information is necessary to accurately identify the causes of environmental problems. Information is critical to the ability of environmental policymakers to design appropriate solutions and programs to address those causes. Information must be gathered on whether environmental actors are complying with their obligations under

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Mississippi, West Virginia, and California, see April Hendricks Killcreas, *The Power of Community Action: Environmental Injustice and Participatory Democracy in Mississippi*, 81 Miss. L.J. 769, 782–93, 795–97 (2012). To a much lesser extent, there is also movement in the private sector to encourage voluntary public disclosure of environmental justice information by business and industry. *See* David Monsma, *Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility*, 33 Ecology L.Q. 443, 492-93 (2006) (urging voluntary corporate reporting of environmental justice indicators through such mechanisms as the Global Reporting Initiative guidelines for corporate environmental and social responsibility reporting). Such efforts seek to encourage the private sector to more "adequately address the central concerns or principles of environmental justice as a matter of corporate social responsibility and sustainable development." *Id.* at 496; *see also* Global Reporting Initiative, Sustainability Reporting Guidelines (Version 3.1) 38 (2011) (requiring reporting on environmental "[o]perations with significant potential or actual negative impacts on local communities"); W. Edward Stead & Jean Garner Stead, Sustainable Strategic Management 194 (2004) ("[U]nder GRI guidelines, firms may want to report how they measure their environmental justice efforts and outcomes in order to ensure that their environmental activities do not have a disproportionately negative impact on low-income or minority communities."). For a further discussion of the evolution of the voluntary regime of corporate environmental reporting and information disclosure, including the Global Reporting Initiative guidelines, see David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. Colo. L. Rev. 379 (2005) [hereinafter Case, *Corporate Environmental Reporting*].

[6] *See* John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy and Toxic Substances Control*, 91 Colum. L. Rev. 261, 261 (1991); David W. Case, *The EPA's HPV Challenge Program: A Tort Liability Trap?*, 62 Wash. & Lee. L. Rev. 147, 148 (2005); Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. Rev. 115, 117-18 (2004).

[7] *See* Applegate, *supra* note 6, at 262-63; Esty, *supra* note 6, at 140-41.

environmental regulatory programs. Similarly, information is necessary to determine whether such programs are achieving success and environmental conditions are improving or whether adjustments to chosen approaches should be made.

Environmental information is also of great importance to the general public. Citizens cannot effectively participate in important governmental activities such as environmental regulation without dependable access to information about the environmental activities of businesses and industry.[8] Citizen enforcement of environmental laws through citizen-suit provisions, a crucial component of environmental protection in this country, would not be possible in the absence of public access to such information.[9] Access to public environmental information is also critical to the ability of citizens to know what environmental risks they may face in their communities.[10] Public environmental information empowers citizens with knowledge about environmental conditions in the places where they live, work, go to school, or recreate.[11] Such knowledge helps citizens evaluate the environmental hazards and risks posed by the activities of businesses and industry that they encounter in their daily lives.

During the last few decades, federal and state "right-to-know" laws, such as the federal Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA),[12] have made more data on environmental risks and hazards available to the public.[13] Such laws seek to provide information that allows individuals to make informed decisions about the presence of pollution, hazardous substances, or other similar concerns in their environments.[14] Public access to information about the presence of pollution or hazardous substances in communities allows individuals to decide on appropriate responsive action. Such

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[8] *See* John D. Echeverria & Julie B. Kaplan, *Poisonous Procedural "Reform": In Defense of Environmental Right-To-Know*, 12 Kan. J.L. & Pub. Pol'y 579, 587-88 (2003).

[9] Bernard A. Weintraub, *Access to Information*, *in* The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks 265, 265 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008).

[10] *See* Robert V. Percival et al., Environmental Regulation: Law, Science, and Policy 311 (6th ed. 2009).

[11] *See* Echeverria & Kaplan, *supra* note 8, at 590.

[12] 42 U.S.C. §§ 11001-11050 (2006).

[13] *See* Echeverria & Kaplan, *supra* note 8, at 582-85.

[14] *Id.* at 590.

actions might include avoiding areas where such pollution is occurring or toxic substances are located. Informed citizens can take other precautions against exposure to pollution or other hazards, or can make decisions about where to live or work or recreate. Informed citizens can also raise concerns with local businesses or employers, seek to publicize such concerns in the media, or create political pressures for government to address specific problems in the community.[15]

Informational needs of policymakers and the public in the environmental arena converge in many unique and important ways in the field of environmental justice. For policymakers, informational needs are particularly acute for efforts to identify communities unfairly experiencing disproportionate environmental burdens so as to be able to target resources, enforcement, and compliance activities to address such injustices.[16] Moreover, public access to information is of "extraordinary importance" in the environmental justice context.[17] Substantial information asymmetries typically exist between polluting industries and entities and surrounding environmental justice communities.[18] Thus, affected community members have less access to information regarding environmental problems than entities creating such problems.[19] As Luke Cole and Sheila Foster have emphasized:

> Low-income and communities of color enter the [environmental] decision-making process with fewer resources than other interests in the decision-making process. These communities have less time, less information, and less

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[15] *See id.* at 590-91; David W. Case, *Changing Corporate Behavior Through Environmental Management Systems*, 31 Wm. & Mary Envtl. L. & Pol'y Rev. 75, 104 (2006) [hereinafter Case, *Changing Corporate Behavior*]; David W. Case, *The Law and Economics of Environmental Information as Regulation*, 31 Envtl. L. Rep. 10773, 10785 (2001) [hereinafter Case, *Environmental Information as Regulation*]; Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 Geo. L.J. 257, 316 (2001).

[16] *See infra* notes 150-78 and accompanying text.

[17] Weintraub, *supra* note 9, at 265.

[18] *Id.*; *see also* Luke W. Cole & Sheila R. Foster, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement 109 (2001).

[19] Weintraub, *supra* note 9, at 265.

> specialized knowledge about the legal, technical, and economic issues involved.[20]

For these reasons, environmental justice advocates argue that such "systematic inequality in the distribution of information about environmental matters is a symptom of environmental injustice."[21] Again, Cole and Foster argue that:

> A communit[y]'s lack of access to . . . information and knowledge creates severe barriers to its full participation in a pluralistic process. As democratic theorists have recognized, information and knowledge are a form of political power in pluralistic processes; only when access to them is relatively equal among parties to a conflict can the parties truly understand their own interests and dialogue proceed toward the democratic ideal.[22]

Thus, efforts to remedy environmental injustices must include efforts to ensure more equitable access to critical environmental information for environmental justice communities.[23]

I. FEDERAL ENVIRONMENTAL JUSTICE POLICY

The environmental justice movement seeks to remedy the disproportionate burden of adverse environmental impacts and exposure to environmental risks borne by low-income and/or minority communities.[24] The movement originated as "a grassroots social justice movement combining the principles of civil rights and environmental protection."[25] The movement "gained traction . . . some 20 years *after* the modern age of environmental law and regulation began."[26] Indeed, most commentators pinpoint the beginning of the movement to the

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[20] Cole & Foster, *supra* note 18, at 109.

[21] Weintraub, *supra* note 9, at 265 (citing Elena Petkova et al., Closing the Gap: Information. Participation, and Justice in Decision-Making for the Environment (2003)); *see also* Svitlano Kravchenko, *Is Access to Environmental Information a Fundamental Human Right?*, 11 Or. Rev. Int'l L. 227 (2009).

[22] Cole & Foster, *supra* note 18, at 109.

[23] Weintraub, *supra* note 9, at 265, 292-93.

[24] Hill, *supra* note 1, at 7; Monsma, *supra* note 5, at 444.

[25] Monsma, *supra* note 5, at 451.

[26] James M. Grijalva & Daniel E. Gogal, *The Evolving Path Toward Achieving Environmental Justice for Native America*, 40 Envtl. L. Rep. 10905, 10906 (2010).

early 1980s and protests by African Americans against the siting of toxic waste dumps in their communities, including the well-known Warren County, North Carolina landfill protests in 1982.[27] However, even though such grassroots efforts originated in the early 1980s, others see the environmental justice movement as a logical continuation and outgrowth of the earlier efforts of the larger civil rights movement of the 1950s through the 1970s.[28]

Commentators have noted that "[t]here is no universally accepted definition of environmental justice."[29] Indeed, the very concept of environmental justice has "evolved considerably" over time.[30] Given its perceived place within the context of the larger civil rights movement, many proponents of environmental justice define the concept within the rubric of "environmental racism."[31] This view argues that minority communities are deliberately targeted for toxic waste disposal and siting of polluting industries through racially discriminatory environmental policymaking and enforcement of regulations and laws.[32] But, while the term "environmental racism" focuses on the racial composition of communities that bear a disproportionate burden of environmental risks and impacts, the concept of "environmental justice" is much broader and focuses on *both* racial *and* socio-economic status as markers of such communities.[33] This focus on "injustice" as well as race seeks to emphasize that environmental justice communities are typically poor and substantially lacking in the political acumen and power enjoyed by business and industry interests that create environmental impacts and risks for surrounding communities.[34]

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[27] *Id.*; Julia C. Rinne & Carol E. Dinkins, *Environmental Justice: Merging Environmental Law and Ethics*, 25 Nat. Resources & Env't 3, 3 (2011).

[28] Cole & Foster, *supra* note 18, at 20.

[29] Michael B. Gerrard, *Preface to the First Edition*, *in* The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks xxxiii, xxxiii (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008); Tom Stephens, *An Overview of Environmental Justice*, 20 T.M. Cooley L. Rev. 229, 233 (2003).

[30] Monsma, *supra* note 5, at 450.

[31] *See* Hill, *supra* note 1, at 13-14 (excerpt from Comm'n for Racial Justice, United Church of Christ, Toxic Wastes and Race in the United States (1987)); *see also* Robert D. Bullard, Dumping in Dixie: Race, Class, and Environmental Quality 98 (1994).

[32] Monsma, *supra* note 5, at 453; Hill, *supra* note 1, at 7.

[33] *See* Cole & Foster, *supra* note 18, at 15.

[34] *Id.* at 70-71, 109.

Partly in an effort, particularly by governmental entities, to avoid the controversial and politically charged nature of such terms as "racism" and "justice," the term "environmental equity" has also become a significant part of the lexicon of the environmental justice movement.[35] "Environmental equity" is defined as the right "of all people to benefit from the environment and to be equally protected from the effects of human use and abuse of it."[36] Emphasizing the concept of "equity" in this manner depicts the issue of disproportionality of environmental risks and impacts "as a matter of achieving an 'equitable' redistribution of pollution."[37] In this regard, the EPA's current environmental justice strategy focuses "not only [on] the consideration of how [environmental] burdens are distributed across all populations, but also how benefits are distributed.[38] That is, the EPA "encourages the evaluation of the distribution of burdens by paying special attention to populations that have historically borne a disproportionate share of environmental harms and risks," but simultaneously requires examination of "the distribution of the positive environmental and health consequences from our activities."[39]

The EPA's emphasis on the concept of environmental equity and de-emphasis on the issue of race in its approach to environmental justice began in 2005.[40] This approach is certainly not without controversy.[41] The equity-focused approach of "treating all communities equally regardless of their race or socioeconomic status" is argued by some commentators to be inconsistent with the environmental justice movement's "focus on

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[35] *Id.* at 15; Hill, *supra* note 1, at 7-8; Monsma, *supra* note 5, at 453.

[36] Willie A. Gunn, *From the Landfill to the Other Side of the Tracks: Developing Empowerment Strategies to Alleviate Environmental Injustice*, 22 Ohio N.U. L. Rev. 1227, 1234 (1996).

[37] Ryan Holifield, *Defining Environmental Justice and Environmental Racism*, 22 Urb. Geography 1, 80 (2001); *see also* Hill, *supra* note 1, at 7-8.

[38] U.S. Envtl. Prot. Agency: Office of Envtl. Justice, Plan EJ 2014, at 3 (2011) [hereinafter EPA, Plan EJ 2014].

[39] *Id.*

[40] Christine M. Foot, *Scrutinizing Strict Scrutiny: Environmental Justice After* Adarand Constructors, Inc. v. Pena, 11 Berkeley J. Afr.-Am. L. & Pol'y 123, 124, 131 (2009); Bradford C. Mank, *Executive Order 12,898*, *in* The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks 101, 117 (Michael B. Gerrard & Sheila R. Foster eds., 2008).

[41] *See* Mank, *supra* note 40, at 117.

giving additional consideration to protecting minorities and low-income persons from disproportionate environmental impacts."[42] This 2005 shift in emphasis is attributed to the EPA's view of its obligations under Supreme Court decisions such as *Adarand Constructors, Inc. v. Pena*[43] and *Gruter v. Bollinger*.[44] *Adarand* and *Gruter* involve whether and how federal and state governments may constitutionally make decisions based upon racial classifications, with such decisions subject to strict scrutiny review and considerations of whether they are "narrowly tailored" to serve "compelling" governmental interests.[45] Whether such precedents should apply to the federal government's environmental justice strategies, however, has been strongly questioned.[46]

Nonetheless, the EPA defines "environmental justice" as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[47] The agency

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[42] *Id.*; *see also* Foot, *supra* note 40, at 124 ("[M]any people became concerned in 2005 when the EPA made a dramatic shift by deemphasizing race in its strategy for identifying potential environmental justice areas of concern.").

[43] 515 U.S. 200 (1995). *Adarand* holds that federal affirmative action programs utilizing racial classifications are subject to strict scrutiny review, and such classifications are thus constitutional only if "narrowly tailored" to serve a "compelling" governmental interest. David W. Case, *Setting a Higher Standard: Judicial Review of Federal Affirmative Action in the Wake of* Adarand, 16 Miss. C. L. Rev. 369, 369 (1996).

[44] 539 U.S. 306 (2003); *see* Foot, *supra* note 40, at 131 ("Around the time it reaffirmed its commitment to environmental justice in November 2005, [the EPA] also began to cite *Adarand* as forbidding any consideration of race in its environmental justice decision-making."); Hill, *supra* note 1, at 197 ("In response to U.S. Supreme Court decisions such as *Adarand Constructors, Inc. v. Pena* and *Gruter v. Bollinger* regarding the use of racial classifications in government decision making, EPA developed a methodology . . . that does not use race as a criterion for making environmental decisions.").

[45] Case, *supra* note 43, at 369; Hill, *supra* note 1, at 197.

[46] *See* Foot, *supra* note 40. *But see* Hill, *supra* note 1, at 197 ("Eventually, it became clear that the approach of the [environmental justice] scholars could not be adopted by federal decisionmakers in the context of environmental protection for one important reason—federal and state governments, based upon the U.S. Constitution, cannot make environmental decisions based upon racial classifications.").

[47] *Environmental Justice: Basic Information*, EPA.gov, http://epa.gov/environmentaljustice/basics/index.html (last visited Jan. 20, 2012). The EPA has reaffirmed this definition of environmental justice as recently as September 2011 in its

defines "fair treatment" in this context as the notion that "no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies."[48] "Meaningful involvement" is defined as:

> 1) potentially affected community members have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; 2) the public's contribution can influence the regulatory agency's decision; 3) the concerns of all participants involved will be considered in the decision-making process; and 4) the decision-makers seek out and facilitate the involvement of those potentially affected.[49]

Significantly, the EPA has identified the availability or lack of necessary information to be a potential barrier to meaningful community involvement in environmental decision-making and a potential contributor to disproportionate environmental risks and impacts.[50]

The EPA's initial focus on environmental justice began following the influential 1987 study *Toxic Wastes and Race in the United States* by the United Church of Christ's Commission for Racial Justice.[51] The Commission's national study concluded that minority and low income communities were disproportionately afflicted with the risks and impacts of industrial pollution and hazardous waste disposal.[52] EPA Administrator William Reilly subsequently formed the EPA's Environmental Equity Workgroup in 1990 to examine evidence that low income and minority

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current strategic environmental justice plan, Plan EJ 2014. *See* EPA, Plan EJ 2014, *supra* note 38, at 3.

[48] U.S. Envtl. Prot. Agency, EPA's Action Development Process: Interim Guidance on Considering Environmental Justice During the Development of an Action 3 (2010) [hereinafter EPA, Interim Guidance], *available at* http://www.epa.gov/compliance/ej/resources/policy/considering-ej-in-rulemaking-guide-07-2010.pdf; EPA, Plan EJ 2014, *supra* note 38, at 3.

[49] EPA, Interim Guidance, *supra* note 48, at 3; EPA, Plan EJ 2014, *supra* note 38, at 3.

[50] EPA, Interim Guidance, *supra* note 48, at 8.

[51] Rinne & Dinkins, *supra* note 27, at 3.

[52] *Id.*

communities were at greater risk than the general population from exposure to environmental hazards.[53] In 1992, the EPA created the Office of Environmental Justice within the agency, and, in 1993, established the National Environmental Justice Advisory Council (NEJAC) to advise the agency on environmental justice issues.[54]

The first formalized federal governmental recognition of the need to address environmental justice concerns came in early 1994 through President Clinton's issuance of Executive Order 12,898.[55] This order requires federal agencies, "to the greatest extent practicable and permitted by law," to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[56] To guide federal agencies in pursuit of this goal, the order created the federal Interagency Working Group on Environmental Justice (IWG).[57] The IWG is comprised of twelve federal agencies and several White House offices and is chaired by the EPA Administrator.[58]

As required by Executive Order 12,898, the EPA issued a report the following year outlining its strategic approach to environmental justice.[59] The EPA's 1995 environmental justice

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[53] *Id.* at 3-4.

[54] *Id.* at 4.

[55] Exec. Order No. 12,898, 3 C.F.R. § 859 (1994), *reprinted in* 42 U.S.C. § 4321 (2006) [hereinafter Exec. Order 12,898]. The state of Connecticut had created the first formalized governmental environmental justice program the previous year in 1993. Steven Bonorris & Nicholas Targ, *Environmental Justice in the Laboratories of Democracy*, 25 Nat. Resources & Env't 44, 44 (2010). As of 2010, forty-one states had "statutes, regulations, or other initiatives that further environmental justice." *Id.*

[56] Exec. Order 12,898, *supra* note 55, § 1-101.

[57] *Id.* § 1-102.

[58] *Id.* The IWG is comprised of the heads of the Department of Defense, Department of Health and Human Services, Department of Housing and Urban Development, Department of Labor, Department of Agriculture, Department of Transportation, Department of Justice, Department of the Interior, Department of Commerce, Department of Energy, Environmental Protection Agency, Office of Management and Budget, Office of Science and Technology Policy, Office of the Deputy Assistant to the President for Environmental Policy, Office of the Assistant to the President for Domestic Policy, National Economic Council, and Council of Economic Advisors. *Id.*

[59] Mank, *supra* note 40, at 105.

strategy was organized around the following principles: (1) encouraging public participation by low-income and minority communities and partnering with such communities to achieve environmental justice goals; (2) promoting environmental justice through research to improve knowledge about environmental health risks and to reduce risks through development of pollution prevention strategies; (3) improving the agency's information systems to identify and address disproportionate and adverse health and environmental effects on low-income and minority communities; (4) working with tribal governments, indigenous organizations, affected native populations, and the NEJAC to address unique environmental justice issues faced by those communities; and (5) considering and focusing on environmental justice issues through enforcement efforts and the regulatory process.[60]

In 2005, EPA Administrator Stephen Johnson issued a memorandum reaffirming the agency's commitment to environmental justice, including the principles set forth in Executive Order 12,898.[61] In order "to more fully and effectively integrate environmental justice into [the EPA's] programs, policies, and activities," Johnson's memorandum directed the agency to incorporate environmental justice considerations into its Strategic Plan for Fiscal Years 2006-2011.[62] This marked the first time for environmental justice to be included as part of the EPA's overall strategic plan.[63] The EPA under the Obama Administration recently continued this approach by incorporating environmental justice concerns into the agency's Strategic Plan for Fiscal Years 2011-2015.[64] The plan stresses the EPA's commitment to "reduce and prevent harmful exposures and health risks to . . . underserved, disproportionately impacted low-income, minority and tribal communities."[65] Consistent with the agency's continuing emphasis on environmental equity, the plan further emphasizes that "[e]nvironmental justice . . . will be achieved

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[60] *Id.* at 105-08.

[61] Hill, *supra* note 1, at 201.

[62] *Id.* at 202.

[63] *Id.* at 201.

[64] *See* U.S. Envtl. Prot. Agency, Fiscal Year 2011-2015 EPA Strategic Plan: Achieving Our Vision 3, 30-31 (2010) [hereinafter EPA, 2011-2015 Strategic Plan].

[65] *Id.* at 30.

when all Americans, regardless of age, race, economic status, or ethnicity, have access to clean water, clean air, and healthy communities."[66]

Over the past two years, the Obama Administration has initiated a flurry of activity related to the goal of incorporating environmental justice into the policies and activities of the EPA and other federal agencies. In July 2010, the EPA released its *Interim Guidance on Considering Environmental Justice During the Development of an Action*.[67] The guide is intended to assist EPA staff in determining "whether actions raise possible environmental justice concerns," to "encourage public participation in the rulemaking process," and to support the agency in meeting its responsibilities under Executive Order 12,898.[68] Specifically, the EPA states that the guide's purpose "is to explicitly integrate [environmental justice] considerations into the fabric of EPA's [process for developing regulations]—from rule inception through all the stages leading to promulgation and implementation—requiring that workgroups meaningfully engage with and consider the impacts on minority, low-income, and indigenous populations, and tribes."[69]

Also in July 2010, the EPA released a draft plan for public comment, titled *Plan EJ 2014*, intended to further the environmental justice commitments made in the agency's 2011-2015 Strategic Plan.[70] In the draft plan, the EPA described *Plan EJ 2014* as "a roadmap to help EPA integrate environmental justice into its programs."[71] The draft plan characterized environmental justice as a renewed priority for the agency which challenges it "to identify better ways to address the issues facing many minority, low-income, and indigenous people with environmental justice burdens and concerns."[72] To "shape [its]

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[66] *Id.*

[67] EPA, Interim Guidance, *supra* note 48.

[68] Memorandum from Lisa Heinzerling, Assoc. Adm'r, U.S. Envtl. Prot. Agency, Transmitting Interim Guidance on Considering Envtl. Justice During the Dev. of an Action to EPA Adm'rs and Counsel (July 22, 2010), *available at* http://www.fs.fed.us/emc/nepa/includes/considering_ej_in_rulemaking_guide072010.pdf.

[69] EPA, Interim Guidance, *supra* note 48, at i.

[70] U.S. Envtl. Prot. Agency, Plan EJ 2014, at 1 (Draft for Public Comment, July 27, 2010) [hereinafter EPA, Draft Plan EJ 2014] (copy on file with author).

[71] *Id.* at 2.

[72] *Id.* at 1.

work" on this challenge, the draft plan identified three goals for the agency: (1) "Protect the environment and health in overburdened communities"; (2) "Empower communities to take action to improve their health and environment"; and (3) "Establish partnerships with local, state, tribal and federal governments and organizations to achieve healthy and sustainable communities."[73]

To achieve these goals, and to "advance environmental justice across EPA and the federal government," the draft *Plan EJ 2014* identified five areas of priority: (1) incorporating environmental justice into rulemaking; (2) considering environmental justice concerns within EPA's permitting process; (3) accelerating compliance and enforcement initiatives; (4) supporting community-based programs; and (5) fostering administration-wide action on environmental justice.[74] The EPA emphasized that *Plan EJ 2014*'s ultimate objective would be to unify the agency's approach to environmental justice, thus making it "more efficient and coordinated and ultimately more effective."[75] As its title suggests, the EPA intends to implement *Plan EJ 2014* by the year 2014 which will be the twentieth anniversary of the Clinton Administration's issuance of Executive Order 12,898.[76]

The Obama Administration took its next step several months later, in September 2010, by formally reconvening the IWG which up until that point had been dormant for more than a decade.[77] The EPA touted this event as further evidence of the administration's "recommitment to advancing the mandate of Executive Order 12898."[78] Nearly a year later, in August 2011, the federal agencies and other entities constituting the IWG, and a number of agencies not originally named in Executive Order 12,898, signed the *Memorandum of Understanding on*

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[73] *Id.* at 1-2.

[74] *Id.* at 2.

[75] *Id.* at 2-3.

[76] *Id.* at 1.

[77] Plan EJ 2014, *supra* note 38, at 6; Press Release, U.S. Envtl. Prot. Agency, EPA Hosts Historic Meeting on Envtl. Justice (Sept. 22, 2010), *available at* http://yosemite.epa.gov/opa/admpress.nsf/0/d651c10d4a830640852577a600583d81?OpenDocument.

[78] *Id.*

Environmental Justice and Executive Order 12898 (MOU).[79] The purposes of the MOU are to: (1) "declare the continued importance of identifying and addressing environmental justice considerations in agency programs, policies, and activities as provided in Executive Order 12898"; (2) renew the order's process for agencies to provide public environmental justice strategies and implementation progress reports; (3) promote the effective and efficient operation of the IWG; and (4) identify specific areas of focus for agency environmental justice efforts.[80] The MOU requires each federal agency to post, and periodically review and update, its current "Environmental Justice Strategy" on its public webpage, to ensure that meaningful opportunity is provided to the public to submit comments and recommendations on such strategies, and to submit an "Annual Implementation Progress Report" concerning its environmental justice strategy that is also posted on the agency's public webpage.[81]

In September 2011, the Obama Administration took its most significant and comprehensive step to date in pursuit of environmental justice objectives with release of the final version of *Plan EJ 2014*.[82] Where the July 2010 draft plan was a several pages long sketch, the final version of *Plan EJ 2014* is a nearly 180-page roadmap of the EPA's strategy to fully implement the mandate of Executive Order 12,898 by its twentieth anniversary in 2014.[83] The final version of *Plan EJ 2014* breaks down into three major sections: (1) cross-agency focus areas, (2) tools development areas, and (3) a statement of intention to designate environmental justice initiatives for future inclusion in specific

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[79] Press Release, U.S. Envtl. Prot. Agency, Obama Admin. Advances Efforts to Protect Health of U.S. Cmtys. Overburdened by Pollution (Aug. 4, 2011); Memorandum of Understanding on Envtl. Justice and Exec. Order 12898, U.S. Envtl. Prot. Agency (2011) [hereinafter Memorandum of Understanding], *available at* http://www.epa.gov/compliance/ej/resources/publications/interagency/ej-mou-2011-08.pdf.

[80] Memorandum of Understanding, *supra* note 79, at 2.

[81] *Id.* at 3.

[82] *See* EPA, Plan EJ 2014, *supra* note 38; Press Release, U.S. Envt. Prot. Agency, EPA Releases Strategy to Protect People's Health and the Env't in Cmtys. Overburdened by Pollution (Sept. 14, 2011); *available at* http://yosemite.epa.gov/opa/admpress.nsf/0/D61877F90D74C1EF8525790B00599458 [hereinafter Press Release, EPA].

[83] EPA, Plan EJ 2014, *supra* note 38; Press Release, EPA, *supra* note 82.

EPA programs.[84] In addition, the plan expresses the EPA's commitment to pursue "long overdue, vigorous, robust, and effective implementation of Title VI of the Civil Rights Act of 1964 and other nondiscrimination statutes."[85] The plan characterizes compliance with such statutory civil rights obligations as "a critical part of [the agency's] efforts to advance environmental justice."[86]

The finalized plan's "cross-agency focus areas" are the same five priority areas identified in the draft plan.[87] However, each focus area in the final version of *Plan EJ 2014* includes a detailed implementation plan articulating a goal intended to be achieved by the plan, itemizing specific strategies for accomplishing that goal, and listing specific activities, deliverables, and milestones to implement each strategy.[88] The goals of the "cross-agency focus areas" include to: (1) "more effectively protect human health and the environment for overburdened populations by developing and implementing guidance to incorporate environmental justice into EPA's rulemaking process";[89] (2) "enable overburdened communities to have full and meaningful access to the permitting process and to develop permits that address environmental justice issues to the greatest extent practicable under existing environmental laws";[90] (3) "fully integrate consideration of environmental justice concerns into the planning and implementation of [the EPA Office of Enforcement and Compliance Assurance]'s program strategies, case targeting strategies, and development of remedies in enforcement actions to benefit overburdened communities over the next three years";[91]

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[84] EPA, Plan EJ 2014, *supra* note 38, at i, iv, vi.

[85] *Id.* at vi.

[86] *Id.*

[87] *Compare id.* at i-iii, *with supra* note 74 and accompanying text.

[88] EPA, Plan EJ 2014, *supra* note 38, at 6, 36-39 (implementation plan for "incorporating environmental justice into rulemaking"), 45-50 (implementation plan for "considering environmental justice issues in permitting"), 59-76 (implementation plan for "advancing environmental justice through compliance and enforcement"), 81-88 (implementation plan for "supporting community-based action programs"), and 94-106 (implementation plan for "fostering administration-wide action on environmental justice").

[89] *Id.* at 9.

[90] *Id.* at 11.

[91] *Id.* at 13.

(4) "strengthen community-based programs to engage overburdened communities and build partnerships that promote healthy, sustainable, and green communities";[92] and (5) "facilitate the active involvement of all federal agencies in implementing EO 12898 by minimizing and mitigating disproportionate negative impacts while fostering environmental, public health, and economic benefits for overburdened communities."[93]

Plan EJ 2014 also carries forward four "tools development areas" (Science, Law, Information, and Resources), identified in the draft plan, and also sets forth strategies, activities, deliverables, and milestones for accomplishing the goals identified under each area.[94] The goals of the "tools development areas" include to: (1) "substantially support and conduct research that employs participatory principles and integrates social and physical sciences aimed at understanding and illuminating solutions to environmental and health inequalities among overburdened populations and communities in the United States";[95] (2) "provide legal assistance to EPA policy makers and other Agency decision makers to advance their environmental justice objectives and achieve the Agency's vision of using the law as a tool to advance environmental justice";[96] (3) "develop a more integrated, comprehensive, efficient, and nationally consistent approach for collecting, maintaining, and using geospatial information relevant to overburdened communities";[97] and (4) "develop an efficient and effective system for delivering financial and technical assistance to communities to empower them to improve their health and environment."[98]

Plan EJ 2014 contemplates that the EPA will conduct an assessment in 2014 on the progress made in achieving the goals set out in the strategy's nine implementation plans.[99] This

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[92] *Id.* at 16.

[93] *Id.* at 19.

[94] *Id.* at 113-38 (implementation plan for "science tools development"), 148-49 (implementation plan for "legal tools development"), 153-57 (implementation plan for "information tools development"), and 163-79 (implementation plan for "resources tools development").

[95] *Id.* at 21.

[96] *Id.* at 23.

[97] *Id.* at 24.

[98] *Id.* at 26.

[99] *Id.* at vi.

assessment will result in a report "on the accomplishments, lessons learned, challenges, and next steps" for the EPA's continuing efforts to integrate environmental justice into all agency decisions.[100]

II. FEDERAL POLICY ON INFORMATION AND ENVIRONMENTAL JUSTICE

The starting point for discussion of federal policy on the importance of information within the environmental justice context is Executive Order 12,898. Section 5-5 of the order is captioned "Public Participation and Access to Information."[101] This portion of the order emphasizes the importance of promoting "public participation in environmental decision making and public access to health or environmental information."[102] In this regard, the order requires federal agencies to "work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public."[103] Further, agencies are encouraged, although not required, to translate such information deemed "crucial" for "limited English speaking populations."[104] Environmental justice advocates deem such provisions critical for addressing barriers to adequate opportunities for low-income and minority communities to participate fully in environmental decision-making processes.[105] Problems such as literacy or language barriers, obscure or untimely official notices, and documents in technical and highly specialized language create serious accessibility obstacles to participation for environmental justice communities.[106]

Perhaps even more important informational aspects of Executive Order 12,898, however, are in stated requirements that agencies affirmatively generate information relevant to environmental justice considerations. Section 3-302 directs covered federal agencies to "collect, maintain, and analyze

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[100] *Id.*
[101] Exec. Order 12,898, *supra* note 55, § 5-5.
[102] Mank, *supra* note 40, at 104.
[103] Exec. Order 12,898, *supra* note 55, § 5-5(c).
[104] *Id.* § 5-5(b).
[105] *See* Cole & Foster, *supra* note 18, at 109-10.
[106] *Id.* at 110.

information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income."[107] Agencies are further required, "[t]o the extent practical and appropriate," to utilize such "information to determine whether their programs, policies, and activities have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations."[108]

In connection with the "agency-wide environmental justice strategy" required of each agency by Executive Order 12,898, covered agencies must also:

> [C]ollect, maintain and analyze information on the race, national origin, income level, and other . . . appropriate information for areas surrounding facilities or sites expected to have a substantial human health, or economic effect on the surrounding populations, when such facilities or sites become the subject of a substantial Federal environmental administrative or judicial action.[109]

Similar information is required for areas surrounding federal facilities subject to reporting requirements under EPCRA.[110] Information in these latter two categories must "be made available to the public unless prohibited by law."[111]

As required by Executive Order 12,898, the EPA crafted its first environmental justice strategy the following year. The EPA's 1995 environmental justice strategy followed up on the informational foundations of Executive Order 12,898 by committing to improve the EPA's information systems in order to identify and address adverse environmental impacts on environmental justice communities.[112] The 1995 strategy also committed the agency to develop improved databases to identify major facilities or sites posing significant environmental or health risks to such communities, as well as to promote Geographic Information Systems (GIS) in order to better identify such

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[107] Exec. Order 12,898, *supra* note 55, § 3-302(a).
[108] *Id.*
[109] *Id.* § 3-302(b).
[110] *Id.* § 3-302(c).
[111] *Id.* §§ 3-302(b), (c)(2).
[112] Mank, *supra* note 40, at 107.

communities.[113] In addition, the 1995 strategy pledged that the EPA would improve its information systems to encourage dual communication between the agency and public users of its information and would further produce educational materials to promote greater understanding of such information.[114]

The EPA's current Strategic Plan for Fiscal Years 2011-2015 also places substantial importance on promotion of public access to information that, among other things, would assist in identifying and addressing environmental justice concerns. Included among the strategic goals stated in the EPA's current plan is to "[e]ngage and empower communities and partners, including those who have been historically under-represented, in order to support and advance environmental protection."[115] To accomplish this goal, the EPA makes a number of commitments related to promoting public access to information within an environmental justice context, including: (1) "Educate and empower individuals, communities, and Agency partners in decision making through public access to environmental information and data"; (2) "Ensure that the Agency's regulations, policies, budget, and decision-making processes are transparent and accessible through increased access to environmental data sources, community right-to-know tools, and direct stakeholder engagement"; and (3) "Encourage citizens to understand the complexities and impacts of environmental issues and environmental stewardship, and provide avenues and tools that enhance their ability to participate in processes that could affect them."[116]

In a similar vein, the EPA's current strategic plan emphasizes that information gaps regarding facility releases and compliance by polluters increase the difficulty "for communities to know what pollution is occurring in their own neighborhoods."[117] Thus, the EPA "recognizes that [it] must improve facility monitoring of pollution and make that information available to the public using twenty-first century technologies including more

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[113] *Id.*

[114] *Id.*

[115] EPA, 2011-2015 Strategic Plan, *supra* note 64, at 29.

[116] *Id.*

[117] *Id.* at 41.

comprehensive electronic reporting."[118] This is consistent with other areas of the strategic plan in which the agency pledges to make "more information available to the public in an easy-to-use, understandable format so the public can demand better facility and government performance."[119]

The EPA's current comprehensive environmental justice strategy—*Plan EJ 2014*—highlights the importance of information, and, in particular, the *generation* of necessary information, in addressing environmental justice challenges. In this regard, *Plan EJ 2014* emphasizes that working "to ensure that all parts of society have access to accurate information sufficient to effectively participate in managing human health and environmental risks" is an important component of the EPA's effort to achieve environmental justice priorities.[120] Thus, as part of the goal to ensure that environmental justice communities are able to participate fully and meaningfully in permitting processes, *Plan EJ 2014* commits to the development of tools to fully inform such communities "about the potential impacts of permitted activities and [allow them to] understand the information they receive."[121] Such tools will include enhanced permitting public participation guidance (including on-line support), public outreach and notification efforts, production of plain language documents and appropriate language translations, and guidance on public use of existing and proposed EPA environmental justice screening tools.[122]

Similarly, as part of *Plan EJ 2014*'s goal to advance environmental justice through compliance and enforcement efforts, the EPA pledges to increase efforts "to communicate with affected communities and the public about enforcement strategies and actions that may affect overburdened communities."[123] Emphasizing that environmental justice communities "have a legitimate need to be informed," the plan reflects the EPA's commitment "to increase outreach to [such] communities and to

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[118] *Id.*
[119] *Id.* at 39.
[120] EPA, Plan EJ 2014, *supra* note 38, at 2.
[121] *Id.* at 45.
[122] *Id.* at 51-53.
[123] *Id.* at 68.

provide more information about environmental and public health problems caused by failure to comply with federal environmental laws, efforts to address those problems, and available judicial and administrative solutions to those problems that can address the communities' concerns and needs."[124] Activities identified in the plan in support of this commitment include providing "affected communities with information about enforcement actions and meaningful opportunities for input on potential environmental justice concerns and remedies to be implemented," and improving "website information and other public information materials to explain EPA's site cleanup enforcement processes."[125]

In the "Tools Development" section of the July 2010 draft of *Plan EJ 2014*, the EPA pledged to "focus on developing the scientific, legal, and data and information foundation that support environmental justice analysis, community work, and communications and stakeholder engagement."[126] Regarding development of this "data and information foundation," the draft plan stated, "EPA is working to develop a common mapping platform and nationally consistent screening and targeting tool to enhance [environmental justice] analysis and decision-making."[127] The EPA asserted that these endeavors would "enhance efforts to provide accessible information to communities and foster transparency."[128] In a draft implementation plan for development of this screening tool released in March 2011, the EPA asserted that the tool would normalize and increase the consistency of the information and methods utilized by agency-wide environmental justice screening efforts.[129]

In furtherance of these pledges, the September 2011 final version of *Plan EJ 2014* includes a separate section on "Information Tools Development."[130] The section notes that, as part of agency efforts to implement the mandate of Executive Order 12,898, the EPA has "developed a variety of internal

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[124] *Id.*

[125] *Id.* at 69.

[126] EPA, Draft Plan EJ 2014, *supra* note 70, at 2.

[127] *Id.* at 6.

[128] *Id.*

[129] U.S. Envtl. Prot. Agency, Office of Policy, Plan EJ 2014 Information Tools Development: Draft Implementation Plan 1 (2011).

[130] *See* EPA, Plan EJ 2014, *supra* note 38, at 150-58.

environmental justice screening tools and other Geographic Information Systems (GIS) applications," including most notably the Environmental Justice Strategic Enforcement Assessment Tool (EJSEAT) and EJView.[131] The plan emphasizes that, in addition to these previous efforts, the "EPA is developing a suite of tools, data, and services known as EPA's GeoPlatform that will help coordinate and consolidate mapping activities, applications, and data across the Agency."[132] The EPA's GeoPlatform is intended to support components of the nationally consistent environmental justice screening tool under development in furtherance of the agency's efforts to meet the goals of *Plan EJ 2014*.[133]

The primary goal established by the "Information Tools Development" section's implementation plan is the development of "a more integrated, comprehensive, efficient, and nationally consistent approach for collecting, maintaining, and using geospatial information relevant to overburdened communities."[134] The strategies identified to accomplish this goal include development of both the GeoPlatform and the nationally consistent environmental justice screening tool and incorporation of appropriate elements of the screening tool into the GeoPlatform.[135]

Plan EJ 2014 describes the GeoPlatform as a project to "coordinate activities, applications, and data across the Agency."[136] The EPA asserts that the GeoPlatform is intended to provide "ultimately everyone" the ability to perform relevant geospatial environmental justice analysis "using common data, tools, and techniques."[137] The purpose of the related environmental justice screening tool is identified as providing, "for locations across the United States, a comprehensive and nationally consistent tool for presenting available environmental

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[131] *Id.* at 151. For discussion of EJSEAT and EJView, see *infra* notes 150-89 and accompanying text.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* at 153.

[137] *Id.*

and demographic data."[138] The plan emphasizes that this device "will serve as a national baseline screening tool, which can then be supplemented with additional information and on-the-ground experience to help identify overburdened communities that may warrant additional investigation by EPA to help reduce [environmental] risk and improve public health."[139]

III. ENVIRONMENTAL JUSTICE INFORMATION: TOOLS AND SOURCES

In general, the EPA has long viewed increasing public disclosure of and access to environmental information as an important strategic goal to advance environmental protection.[140] In 1998, the EPA created the Office of Environmental Information "to advance the creation, management, and use of data as a strategic resource to advance public health and environmental protection, . . . and improve the public's access to information about environmental conditions."[141] Advocates of "informational regulation" argue that public distribution of information may lead to improvement in the environmental performance of business and industry.[142] Public information disclosure has the potential to encourage beneficial corporate environmental behavioral change through social and market-based pressures created by informal monitoring regimes triggered by such disclosure.[143] These informal regimes include external monitoring performed by government regulators, local communities, industry competitors, economic markets, and self-monitoring from firm managers.[144]

The perceived success of informational regulatory strategies in creating conditions that can improve the environmental

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[138] *Id.* at 155.

[139] *Id.* at 155-56.

[140] Case, *Corporate Environmental Reporting*, *supra* note 5, at 382 & n.14.

[141] Nat'l Acad. of Pub. Admin., Environment.Gov: Transforming Environmental Protection for the 21st Century 170 (2000), *available at* http://www.epa.gov/evaluate/pdf/environdotgov.pdf; Case, *Corporate Environmental Reporting*, *supra* note 5, at 382 n.14.

[142] Case, *Environmental Information as Regulation*, *supra* note 15, at 10,785; Case, *Corporate Environmental Reporting*, *supra* note 5, at 381 & n.11.

[143] Karkkainen, *supra* note 15, at 261-62; Case, *Environmental Information as Regulation*, *supra* note 15, at 10,785-86.

[144] Karkkainen, *supra* note 15, at 261-62, 295-97, 309-12, 316, 323-27; Case, *Environmental Information as Regulation*, *supra* note 15, at 10,785-86.

performance of business and industry has encouraged even greater public demands for access to environmental information.[145] This perception is, as discussed below, largely fueled by the relative successes of the Toxics Release Inventory (TRI) created in 1986 by EPCRA.[146] Further, the belief that the public has a fundamental right to know about pollution problems and other environmental hazards in their communities has also strongly contributed to increased demands for publicly available environmental information.[147]

Thus, over the last several years, the amount and types of environmental information made available to the public have grown considerably. Similarly, much greater use is being made of that information by federal and state governments, environmental groups, communities, and concerned citizens. More environmental information is currently produced and made publicly available by the EPA and many other information providers than ever before.[148] Moreover, evolutionary advances in internet-based information sharing technologies have made environmental information far easier to produce and make publicly available than was possible in the past.[149] This substantial growth in the availability and accessibility of environmental information has very obvious implications for efforts to identify and address environmental justice concerns in both the public and private sectors. The following discussion explores several examples of environmental justice informational tools or sources of publicly accessible environmental information that may be of value for environmental justice related purposes.

A. EPA's Environmental Justice Strategic Enforcement Assessment Tool (EJSEAT)

The EPA has been working since 2003 to develop the Environmental Justice Strategic Enforcement Assessment Tool (EJSEAT) for purposes of identifying communities experiencing disproportionate environmental and health burdens and focusing

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145 Case, *Corporate Environmental Reporting*, *supra* note 5, at 381-82.

146 *See infra* notes 216-22 and accompanying text.

147 *See* Echeverria & Kaplan, *supra* note 8, at 582-91.

148 *See* Weintraub, *supra* note 9, at 266-67.

149 *Id.*

agency enforcement and compliance efforts in such areas.[150] The EPA asserts that "a nationally consistent approach to identifying areas with potential environmental justice concerns is necessary to accomplish" its strategic environmental justice goals.[151] The EPA's Office of Enforcement and Compliance Assurance (OECA) completed a prototype of the EJSEAT in December 2007.[152] As of the writing of this article, the EPA's website indicated that the "EJSEAT is currently a draft tool in development, intended for internal EPA use only."[153]

In developing the EJSEAT, the OECA seeks to identify factors that can indicate communities experiencing disproportionate environmental burdens "based on nationally consistent and available data."[154] As presently configured, the EJSEAT utilizes a set of eighteen such individual environmental justice indicators, grouped into four categories: demographic, environmental, health, and compliance.[155] All information for each indicator is derived from publicly available information databases.[156] Following a formulaic process of combining, averaging, and normalization, the indicators in the various categories combine to produce an EJSEAT score which "form[s] the basis of ranking census tracts for their environmental justice potential."[157]

The EJSEAT's demographic indicators are taken from census data, and include: (1) percentage of individuals below the poverty line; (2) percentage of individuals over twenty-five years of age without a high school diploma; (3) percentage of individuals who are children under five-years of age; (4) percentage of individuals

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[150] Nat'l Envtl. Justice Advisory Council, Nationally Consistent Environmental Justice Screening Approaches app. A at 1 (May 2010) [hereinafter NEJAC, Environmental Justice Screening Approaches]; *available at* http://www.epa.gov/compliance/ej/resources/publications/nejac/ej-screening-approaches-rpt-2010.pdf.

[151] *Id.*

[152] *Id.*

[153] *Environmental Justice: The Environmental Justice Strategic Enforcement Assessment Tool (EJSEAT)*, EPA.gov, http://www.epa.gov/compliance/ej/resources/policy/ej-seat.html (last visited Jan. 20, 2012).

[154] NEJAC, Environmental Justice Screening Approaches, *supra* note 150, app. A, at 1.

[155] *Id.* at 3.

[156] *Id.*

[157] *Id.* at 4.

over sixty-four years of age; (5) percentage of "linguistically isolated" households; and (6) percentage of individuals who are minorities.[158] Environmental indicators are taken from the National Air Toxics Assessment and Risk Screening Environmental Indicators (RSEI) databases, and include information on cancer risks, neurological and respiratory hazards, particulate matter and ozone concentrations, and RSEI risk-related scores for all federally permitted industrial facilities in each census track.[159] Health indicators are based on county-level data and include infant mortality and low birth weight rates.[160] Compliance indicators are derived from various databases and include facility registration system (FRS) facilities per square mile, and computed measures of inspections, violations, and formal actions.[161]

In May 2010, the National Environmental Justice Advisory Council (NEJAC)[162] issued a report titled *Nationally Consistent Environmental Justice Screening Approaches* reflecting a comprehensive and critical analysis of the EJSEAT.[163] The report had been previously requested by the OECA in 2008 to provide "advice and recommendations from the NEJAC to improve EJSEAT's comprehensiveness, efficacy and accuracy."[164] Although noting that the desire to "improve consistency in EPA's environmental justice program is commendable," the NEJAC's report is highly critical of the EJSEAT, describing it as an extremely limited and, at best, "coarse screening tool."[165] The report contains well over 100 areas of concern and recommendations for improvement of the EJSEAT.

Among the most significant of the NEJAC's criticisms is that the informational databases that the EJSEAT draws on are insufficient for comprehensive and conclusive environmental justice analysis. The NEJAC emphasizes that the "EJSEAT contains a wide range of environmental information, but it is not

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158 *Id.* at 3-4.
159 *Id.* at 4.
160 *Id.*
161 *Id.*
162 *See supra* note 54 and accompanying text.
163 NEJAC, Environmental Justice Screening Approaches, *supra* note 150.
164 *Id.* at 1.
165 *Id.* at 1, 5.

exhaustive."[166] Of particular concern are the limitations of the federal informational databases utilized by the EJSEAT, because such data sources "do not adequately capture a number of activities within and conditions endemic to environmental justice areas."[167] Among the numerous informational omissions emphasized by the NEJAC include: impacts from facilities and land use activity that occur without federally required air permits; activities exempt from EPCRA's TRI reporting; activities of "minor facilities" under the Clean Air Act and Clean Water Act; Clean Water Act "nonpoint" source water pollution; Clean Air Act mobile sources; small quantity hazardous waste generators; underground tanks; closed or abandoned facilities and remedial sites; and facilities exempt from permitting requirements because of small size, grandfathering, or exempted status.[168] The NEJAC also criticizes the EJSEAT for its failure to "include qualitative data" that would "provide important additional information for evaluating the nature and severity of risks" faced by environmental justice communities.[169]

Because of these deficiencies, the NEJAC asserts that the "EJSEAT is not able to capture sufficient information to assure comprehensive identification of all environmental justice communities."[170] Indeed, the EJSEAT is often unable to "pinpoint environmental justice communities that are fairly small geographically, such as neighborhoods or areas within a metropolitan area, or rural communities."[171] Thus, the NEJAC's report urges the OECA to view the EJSEAT as "only a coarse screen" and not a tool that provides "a conclusion that any particular community is or is not an environmental justice community."[172] The NEJAC thus urges "caution" in use of the

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[166] *Id.* at 7.

[167] *Id.* at 6.

[168] *Id.*

[169] *Id.* at 7.

[170] *Id.* at 6.

[171] *Id.*

[172] *Id.* at 17. The NEJAC report makes a distinction, however, between prospective and retrospective analysis of environmental justice areas. *Id.* at 5. For analysis that looks to past treatment of an environmental justice area, the report notes that the "EJSEAT is a good way to see if priority environmental justice areas receive relatively more or fewer inspections, faster or slower cleanup, or more or fewer small grants or Brownfields grants." *Id.* Further, a retrospective EJSEAT "assessment can offer

EJSEAT to identify environmental justice communities, arguing that such efforts must be supplemented by additional, localized information and other analysis that compensates for the screening tool's serious informational limitations.[173]

In the final version of *Plan EJ 2014*, the EPA stated that it would "[r]eevaluate use of [the] EJSEAT, as appropriate, in response to [the] recommendations of the NEJAC."[174] The EPA noted that this reevaluation of the EJSEAT would also be based on the outcome of work by the EPA's agency-wide Environmental Justice Screening Committee in development of the nationally consistent environmental justice screening tool called for in *Plan EJ 2014*.[175] The EPA indicates the EJSEAT will continue to be utilized as the agency awaits the work of the screening committee, although changes to the EJSEAT based on the NEJAC's recommendations may be made on an interim basis.[176] However, echoing criticisms reflected in the NEJAC's report, *Plan EJ 2014* emphasizes that screening tools such as the EJSEAT and EJView, discussed below, "only provide a starting point for analysis and decision making as to whether a community has environmental justice concerns or whether any enforcement action is appropriate."[177] Before any such conclusions are drawn, the plan asserts that a process of "ground truthing" which takes into consideration other relevant and available information must necessarily occur.[178]

B. EPA's EJView

Consistent with the agency's pledge in its 1995 environmental justice strategy to promote Geographic Information

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insights into whether the existing EPA programs are working to alleviate disparities in environmental justice areas, or if more effort or different approaches are needed." *Id.* For analysis that seeks to identify environmental justice areas for purposes of determining future agency action, however, the NJEAC report asserts that the EJSEAT is significantly limited in its usefulness due to its informational deficiencies. *Id.* at 5-6.

[173] *Id.* at 7, 16, 17.

[174] EPA, Plan EJ 2014, *supra* note 38, at 63.

[175] *Id.* at 63-64, 155-56.

[176] *Id.* at 63-64, 65, 73.

[177] *Id.* at 63.

[178] *Id.*

Systems (GIS) in order to better identify disproportionately burdened communities, the EPA in 2010 released EJView, formerly known as the Environmental Justice Geographic Assessment Tool.[179] EJView is a publicly accessible mapping tool that can be used to create maps and generate detailed reports on environmental conditions in virtually any community in the United States.[180] Maps and reports are generated based on the geographic and data sets chosen by the user among data categories similar to those utilized by the EJSEAT: demographic, health, environmental, and facility-level data.[181]

Demographic information accessible through EJView is derived from census data.[182] Searchable fields include population density, per capita income, percentages of minorities and below poverty residents, education, age, and percentage of English speakers.[183] Health data includes estimates of cancer, respiratory, and neurological risks provided through the EPA's National-Scale Air Toxics Assessment (NATA), and data on infant mortality and low birth weight rates.[184] The environmental and facility-level information draws on data reported to the EPA through such systems as RCRAInfo (hazardous wastes); the Air Facility System (Clean Air Act compliance and permit data); the Permit Compliance System (Clean Water Act discharge data); the TRI, the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) (Superfund sites); the Assessment, Cleanup, and Redevelopment Exchange System (ACRES) (Brownfields data); and water monitoring data from the United States Geological Survey and the EPA's Storage and Retrieval (STORET) System.[185]

Unlike the EJSEAT, the EPA does not appear to intend EJView to be part of any formalized agency screening process for

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[179] *EJView*, EPA.gov, http://epamap14.epa.gov/ejmap/entry.html (last visited Jan. 20, 2012); EPA, Plan EJ 2014, *supra* note 38, at 62.

[180] Hill, *supra* note 1, at 200-01.

[181] *EJView: About EJView*, EPA.gov, http://epamap14.epa.gov/ejmap/help/help.html?tab=8 (last visited Jan. 20, 2012).

[182] *EJView: Description of Map Features*, EPA.gov, http://epamap14.epa.gov/ejmap/help/help.html?tab=3 (last visited Jan. 20, 2012).

[183] *Id.*

[184] *Id.*

[185] *Id.*

identification of and targeting of enforcement or compliance resources in environmental justice communities. Instead, the agency's website states that EJView is "targeted at local community groups" and is "designed for the public to identify potential environmental justice areas – or disadvantaged communities that are being unduly exposed to environmental harms."[186] The EPA stresses that the tool is designed to allow public identification of areas based on geographic and environmental factors the user self-selects and deems "significant."[187] The agency further notes that members of the public can use EJView "to create an information packet with maps and reports to support grant writing, community newsletter materials, and [for other purposes]."[188] Thus, EJView appears to be primarily intended to further the informational goals of public access and right-to-know included in the EPA's 2011-2015 Strategic Plan.[189]

C. EPA's Community Cumulative Assessment Tool (CCAT)

Plan EJ 2014's "Science Tools Development" implementation plan outlines an initiative of the EPA's Office of Research and Development to develop the Community Cumulative Assessment Tool (CCAT), a web-based tool for evaluating "physiological and socioeconomic stressors that result in cumulative impacts in U.S. communities and populations."[190] This tool is intended to "improve the capacity of EPA regional risk assessors to assist communities in understanding the complexity of risk, and provide the means by which to identify priorities."[191] The CCAT is also expected to benefit community health advocates and environmental justice groups by providing public access to improved information to better understand local environmental conditions through data drawn from EPA's informational databases.[192] Such access is anticipated to "increase community capacity to assess their

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[186] *EJView: How to Use This Page*, EPA.gov (Apr. 2010), http://epamap14.epa.gov/ejmap/help/ejHowToUsePage.html.

[187] *Id.*

[188] *Id.*

[189] *See supra* notes 115-19 and accompanying text.

[190] EPA, Plan EJ 2014, *supra* note 38, at 116.

[191] *Id.* at 119.

[192] *Id.* at 118.

environment" and to promote collaboration between communities and agency experts and pursuit of risk reduction strategies to improve public health and environmental conditions.[193]

D. Emergency Planning and Community Right-to-Know Act (EPCRA) and the Toxics Release Inventory (TRI)

Congress enacted the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) as a national legislative program for toxic chemical risk and community safety. EPCRA establishes requirements for federal, state, and local governments and industry regarding emergency planning and "community right-to-know" reporting on hazardous and toxic chemicals and substances.[194] EPCRA is designed to increase the public's knowledge and access to information on chemical hazards at individual facilities, the uses made of such chemicals, and the manner in which they are released into the environment.[195] States and local communities work with industry under EPCRA to utilize the information generated to improve safety and protect public health and the environment.[196]

EPCRA was enacted in response to public concerns over the environmental and safety hazards inherent in the storage and handling of toxic chemicals.[197] Such public concern intensified following accidental chemical releases in the mid-1980s by Union Carbide plants in Bhopal, India and Institute, West Virginia. The December 1984 Bhopal tragedy was the far more serious of the two events; a release of methyl isocynate that killed over 3,000 persons and severely injured scores of thousands of others.[198] In contrast, no deaths occurred in an August 1985 release of aldicarb oxime at Union Carbide's West Virginia plant, and the scores of residents adversely affected were only briefly hospitalized.[199] However, following so closely the already impassioned controversy over Bhopal, and following industry assurances that a similar

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193 *Id.*

194 *See* Weintraub, *supra* note 9, at 272.

195 *Id.*

196 *Id.*

197 Case, *Corporate Environmental Reporting*, *supra* note 5, at 385.

198 Percival et al., *supra* note 10, at 323.

199 *Id.*

accident could not happen in the United States, the West Virginia incident, at the very least, strengthened congressional resolve to affirmatively respond to Bhopal.[200] That response came in the form of EPCRA's provisions requiring comprehensive emergency planning for the potential risks of chemical storage and handling and the reporting of chemical releases.

The programs created by EPCRA produce a wealth of publicly accessible information relevant to efforts to identify and address environmental justice concerns.[201] Perhaps the most significant of these programs in the environmental justice context is EPCRA's Toxics Release Inventory (TRI). TRI information has been described as "one of the most important sources of environmental release information for activists, politicians, and other people concerned with human exposure to dangerous chemicals."[202] Moreover, "because TRI information can be easily correlated to demographic or geographic information, the information has been particularly valuable in environmental justice controversies."[203]

EPCRA requires certain companies to submit annual data to the EPA on amounts of certain toxic chemicals released into the air, water, land, or transferred off-site.[204] The EPA maintains this data in a national computer database—the TRI—accessible by the public, primarily through the Internet.[205] The TRI database contains detailed information on more than 650 chemicals and chemical categories that over 20,000 industrial and other facilities release annually through disposal or other waste management and recycling practices.[206]

The national TRI database provides public access to information about toxic chemical releases and other waste management activities at a local, state, regional, and national level. The public, including communities and environmental

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[200] *Id.*

[201] *See* Weintraub, *supra* note 9, at 272, 273-75.

[202] *Id.* at 276.

[203] *Id.*

[204] Case, *Corporate Environmental Reporting*, *supra* note 5, at 385.

[205] *Id.*

[206] U.S. Envtl. Prot. Agency, 2009 Toxics Release Inventory National Analysis Overview 3-4 (2009) [hereinafter EPA, 2009 Toxics Release Inventory], *available at* http://www.epa.gov/tri/tridata/tri09/nationalanalysis/overview/2009TRINA Overviewfinal.pdf.

justice advocates, can utilize TRI data for a variety of purposes, including informing themselves of risks and concerns in specific communities.[207] For example, TRI data can inform citizens of whether they live near businesses that use toxic chemicals or whether toxic chemicals are being released near neighborhoods, local schools, or public sources of drinking water. TRI information can also be utilized by federal, state, and local governments to identify and gain a better understanding of potential concerns, to prioritize among those concerns, and to assess ongoing pollution prevention activities.[208] Researchers, public interest groups, the media, as well as others are able to access the information for various purposes, including environmental justice concerns, as well.[209]

The EPA provides public access to TRI data over the Internet through the *TRI Explorer*.[210] The *TRI Explorer* is a search engine capable of generating reports of TRI data summarized for individual states or the entire country, or reports on releases, waste transfers, or waste quantities grouped by state, by industry classification, by specific facility name, or by zip code.[211] Another option provided by the EPA for public utilization of TRI information is the TRI.NET data engine.[212] TRI.NET is an application that can be downloaded on a personal computer to allow for more interactive and user-friendly analyses of TRI data.[213] For example, TRI.NET utilizes mapping technologies (such as Google Maps, Google Earth, or Virtual Earth) allowing users to visualize where TRI releases are occurring.[214] TRI.NET also includes the "My TRI Neighborhood" feature allowing searches to limit results to facilities releasing TRI chemicals located within a specified distance of a specific street address.[215]

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[207] *See* Echeverria & Kaplan, *supra* note 8, at 583, 590.

[208] *See id.* at 583.

[209] *See id.*

[210] *TRI Explorer: Release Reports*, EPA.gov, http://iaspub.epa.gov/triexplorer/tri_release.chemical (last visited Jan. 20, 2012).

[211] *See id.*

[212] *TRI.Net Data Engine (TRI.Net)*, EPA.gov, http://www.epa.gov/tri/tridotnet/index.html (last visited Jan. 20, 2012).

[213] *See id.*

[214] *See id.*

[215] *See id.*

This allows the public to visualize facilities releasing TRI chemicals in small communities and neighborhoods.

Public access to TRI information has been credited with influencing companies to make voluntary reductions in releases of chemicals subject to the reporting requirements.[216] Manufacturing facilities have been required to report to the TRI program since 1987.[217] The EPA asserts that public dissemination of information from the TRI database has induced companies to sharply reduce overall levels of releases of TRI chemicals since the program's beginning.[218] These reductions in reported releases have occurred notwithstanding the fact that the releases themselves may be completely lawful under existing environmental regulatory programs. Importantly, EPCRA's TRI reporting requirement does not itself make the releases of toxic chemicals to air, water, or land unlawful. The requirement is simply that the releases be annually reported and that the information subsequently be made publicly available.

Although TRI disclosures have indeed led to significant voluntary reductions in releases of reported chemicals, uncertainty exists as to the specific reasons the annual TRI reporting requirements have had such an effect. Some limited studies by economists have shown that public disclosure of negative environmental information by companies can motivate them to improve their future environmental performance.[219] In theory, post-disclosure pressures brought to bear by non-governmental forces, particularly economic markets and public opinion, create market incentives that positively affect the behavior of environmental actors.[220] However, the effect that information disclosure has on these market forces is poorly understood at best.[221] Even so, public disclosure of environmental information is championed by advocates of "reflexive

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[216] Case, *Corporate Environmental Reporting*, *supra* note 5, at 385-86; Weintraub, *supra* note 9, at 276.

[217] Shameek Konar & Mark A. Cohen, *Information as Regulation: The Effect of Community Right to Know Law on Toxic Emissions*, 32 J. Envtl. Econ. & Mgmt. 109, 113 (1997).

[218] Case, *Corporate Environmental Reporting*, *supra* note 5, at 385 & n.31.

[219] Case, *Environmental Information as Regulation*, *supra* note 15, at 10,777-79.

[220] Case, *Corporate Environmental Reporting*, *supra* note 5, at 383.

[221] *Id.*

environmental law" theory, which seeks to create conditions supporting environmentally beneficial, self-regulatory behavior by corporate and industry actors.[222]

Of substantial importance to environmental justice concerns, however, major weaknesses in the TRI program have subjected this particular information disclosure tool to significant criticism. Of the chemicals that fall within the TRI program, only a relatively small fraction of the sources of releases of these chemicals come within the scope of the reporting requirements.[223] This is due to the fact that only certain industry sectors (primarily major industrial sources) and businesses of a certain size (primarily large) are covered by the TRI requirements.[224] Additionally, only a miniscule fragment of chemicals used commercially in the United States (less than one-percent) fall within the scope of the TRI's coverage, including scores of which may meet or exceed hazards posed by chemicals which are covered.[225] Further, even many otherwise covered sources release covered chemicals in amounts that fall under TRI reporting thresholds.[226] In its evaluation of the EJSEAT, which relies in significant part on TRI data, the NEJAC focused considerable attention on these and other limitations on the scope of information conveyed by the TRI.[227] As a result of such limitations, the NEJAC warns that "many facilities and activities of concern to environmental justice communities will not be captured" by the EJSEAT's reliance on TRI data.[228]

E. Envirofacts Data Warehouse

The Envirofacts Data Warehouse is a publicly accessible environmental information database created and operated by the EPA with many potential applications for both public and private

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[222] *See* Case, *Changing Corporate Behavior*, *supra* note 15, at 105-06.

[223] William F. Pedersen, *Regulation and Information Disclosure: Parallel Universes and Beyond*, 25 Harv. Envtl. L. Rev. 151, 164 (2001).

[224] *Id.*

[225] *Id.* at 169 & n.68, 199 & n.146.

[226] *Id.* at 165-69.

[227] *See* NEJAC, Environmental Justice Screening Approaches, *supra* note 150, at 12-13.

[228] *Id.* at 13.

users of environmental justice related data.[229] Envirofacts provides a single point of public access to information collected by the EPA under its many national environmental regulatory programs. Envirofacts integrates information from several different EPA databases that collect information from facilities required to report about such activities as hazardous waste disposal, air pollution emissions, toxic chemical releases, Superfund sites, or water discharge permits.[230] Individual users of the Envirofacts program may conduct broad searches for information within all of these integrated databases simultaneously. For example, users may retrieve all information in the entire Envirofacts database about environmental regulatory activities in their area by simply entering either a specific zip code or the name of a city or county.[231] Users may also conduct more narrowly focused searches for information within specific databases in the system. For example, users may retrieve information about specific facilities or groups of facilities within specific subject areas included in the database under such discrete topics as Water, Air, Waste, Land, and Toxics.[232] Several of the specific information databases and data retrieval options are discussed below.

1. Water

Envirofacts integrates water information from such EPA databases as the Safe Drinking Water Information System (SDWIS), the Permit Compliance System (PCS), and the Information Collection Rule (ICR).[233] The SDWIS contains information about violations of EPA's drinking water regulations by public water systems.[234] The PCS includes information on companies which have been issued permits to discharge waste

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[229] *Envirofacts*, EPA.gov, http://www.epa.gov/enviro/ [hereinafter EPA, *Envirofacts*] (last visited Jan. 20, 2012).

[230] *See Envirofacts: About the Data*, EPA.gov, http://www.epa.gov/enviro/facts/qmr.html [hereinafter EPA, *Envirofacts: About the Data*] (last visited Jan. 20, 2012).

[231] *See* EPA, *Envirofacts*, *supra* note 229.

[232] *See* EPA, *Envirofacts: About the Data*, *supra* note 230.

[233] *Id.*

[234] *Envirofacts: SDWIS*, EPA.gov, http://www.epa.gov/enviro/facts/sdwis/index.html (last visited Jan. 20, 2012).

water into rivers.[235] Information can be retrieved on when permits were issued and expire, how much waste a company is permitted to discharge, and monitoring data showing what the company has actually discharged.[236] The ICR data was collected pursuant to a national research project by EPA to support development of national drinking water standards.[237] The IRC data reflects information on sources of physical, chemical, and microbial contaminants at national, state, and local water system levels.[238]

2. Air

Envirofacts databases related to air include the Aerometric Information Retrieval System (AIRS), a computer based repository for information about air pollution in the United States.[239] AIRS is operated by the EPA and state and local air pollution control agencies.[240] The information included in the AIRS database comes from reporting by various stationary sources of air pollution, such as electric power plants, factories, and other industrial sources, regarding the air pollutants they produce.[241]

3. Waste

Envirofacts contains Biennial Reporting System information on the generation of hazardous waste from large quantity generators and data on waste management practices from treatment, storage, and disposal facilities.[242] The Resource Conservation and Recovery Act (RCRA) requires the EPA to compile such information twice a year into a Hazardous Waste Report (Biennial Report) to provide a basis for analysis of trends

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[235] *Envirofacts: PCS*, EPA.gov, http://www.epa.gov/enviro/facts/pcs/index.html (last visited Jan. 20, 2012).

[236] *Id.*

[237] *Information Collection Rule (ICR): Overview*, EPA.gov, http://www.epa.gov/enviro/html/icr/index.html (last visited Jan. 20, 2012).

[238] *Id.*

[239] *See* EPA, *Envirofacts: About the Data*, *supra* note 230.

[240] *See id.*

[241] *Envirofacts: AFS*, EPA.gov, http://www.epa.gov/enviro/facts/afs/index.html (last visited Jan. 20, 2012).

[242] *See* EPA, *Envirofacts: About the Data*, *supra* note 230.

regarding hazardous waste disposal.[243] Similarly, the EPA has created the Resource Conservation and Recovery Act Information (RCRAInfo) System to compile information on activities reported to state environmental agencies by hazardous waste generators, transporters, and facilities that treat, store, and dispose of hazardous waste.[244] RCRAInfo database information is also searchable within the Envirofacts database.[245]

Pursuant to its obligations under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the EPA has created the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) database for the purpose of compiling information on Superfund sites around the country.[246] Envirofacts includes the CERCLIS database, allowing users to search for any combination of facility name and geographic location in order to retrieve Superfund data.[247]

4. Land

In addition to the RCRIS and CERCLIS databases, other databases are included in Envirofacts that provide searchable information relating to activities that may affect land. The Assessment, Cleanup and Redevelopment Exchange System (ACRES) contains information on assessment, cleanup, and redevelopment activities at Superfund sites known as "brownfields" (primarily urban properties contaminated by CERCLA hazardous substances).[248] Similarly, Envirofacts contains an interactive tool known as Cleanups in My Community (CIMC) which allows users to map, list, and find cleanup progress profiles for facilities or properties contaminated by hazardous

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[243] *Envirofacts: BR*, EPA.gov, http://www.epa.gov/enviro/facts/br/index.html (last visited Jan. 20, 2012).

[244] *Envirofacts: RCRAInfo*, EPA.gov, http://www.epa.gov/enviro/facts/rcrainfo/index.html (last visited Jan. 20, 2012).

[245] *See* EPA, *Envirofacts: About the Data*, *supra* note 230.

[246] *Envirofacts: CERCLIS*, EPA.gov, http://www.epa.gov/enviro/facts/cerclis/index.html (last visited Jan. 20, 2012).

[247] *Id.*

[248] *See* EPA, *Envirofacts: About the Data*, *supra* note 230.

substances and that are being, or have been, cleaned up under CERCLA or RCRA programs.[249]

5. Toxics

The Envirofacts database integrates information from the EPA's publicly accessible computerized TRI database discussed above.[250]

6. Facilities Information

The Envirofacts database integrates information from the Facility Registry System (FRS), a database managed by the EPA to identify facilities, sites, and places subject to environmental regulations or which are otherwise of environmental interest.[251] Facilities information is also included from the EPA's Enforcement and Compliance History Online (ECHO) database.[252] The ECHO database relates to facilities regulated as Clean Air Act stationary sources of air pollutants, as permitted dischargers under the Clean Water Act, or which have permits or are otherwise regulated under the Resource Conservation and Recovery Act.[253] Four components of the enforcement process for these regulatory programs are documented in the ECHO database: (1) the occurrence of a monitoring event such as an inspection or a self-report; (2) the determination of a violation; (3) the occurrence of an enforcement action to address a violation; and (4) penalties associated with enforcement actions.[254]

7. Mapping Tools

The Envirofacts database includes search tools allowing users to select a specified geographic location and map a cross-section of environmental data pertaining to that location. All of the integrated environmental information regarding facilities or

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[249] *Id.*; *Cleanups in My Community*, EPA.gov, http://iaspub.epa.gov/apex/cimc/f?p=255:63:7501405407734203 (last visited Jan. 20, 2012).

[250] *See supra* notes 205-15 and accompanying text.

[251] *See* EPA, *Envirofacts: About the Data*, *supra* note 230.

[252] *Id.*

[253] *Id.*

[254] *Id.*

locations of environmental concern contained in the Envirofacts database can be accessed through the mapping features.[255] Two primary mapping tools—EnviroMapper for Envirofacts[256] and MyEnvironment[257]—are accessible through the Envirofacts database.[258]

Users can enter a geographic area (such as a street address, zip code, city, county, water body, national park name, etc.) into either of these mapping tools and generate a map image showing the different EPA regulated facilities or other environmental concerns present within that area.[259] Users may also use the mapping tools to conduct narrower searches targeting specific industries or regulatory programs (such as water, air, or land based).[260] For example, users can search by neighborhood and generate maps that show regulated facilities and present community environmental statistics on air quality (including daily ozone and particulate matter forecasts).[261] Another search can generate a map specific to cancer risk levels or water quality or any other factors that might affect the overall environmental quality and livability of a community.[262] A map generated to show facilities releasing toxic chemicals in a specific geographical location would allow users to zoom into a specific facility shown on the map to learn about statistics specific to that facility.[263] This might include such information as how much of those chemicals the facility can lawfully release, the facility's compliance record under applicable statutes, or any records of current violations.[264]

There are virtually unlimited options for conducting searches and generating information of interest for environmental justice purposes through use of the Envirofacts mapping tools. Indeed,

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[255] *Id.*

[256] *EnviroMapper for Envirofacts*, EPA.gov, http://www.epa.gov/emefdata/em4ef.home (last visited Jan. 20, 2012).

[257] *MyEnvironment*, EPA.gov, http://www.epa.gov/myenvironment/ (last visited Jan. 20, 2012).

[258] *See* EPA, *Envirofacts: About the Data*, *supra* note 230.

[259] *See MyEnvironment: How to Use This Page*, EPA.gov, http://www.epa.gov/myenvironment/howUsePage.html (last visited Jan. 20, 2012).

[260] *See id.*

[261] *See id.*

[262] *See id.*

[263] *See id.*

[264] *See id.*

these tools appear to overlap considerably with the informational databases and various applications offered by the EPA's publicly accessible environmental justice mapping tool, EJView. The EPA's efforts to develop such GIS tools are particularly useful for public and private sector efforts to identify and address environmental justice concerns. As observed by Bernard Weintraub, "[m]any potent claims of environmental injustice revolve around the distribution of the benefits and burdens of environmental policy."[265] Maps can be "powerful tools for visualizing and understanding the distribution of [environmental] benefits and burdens . . . borne by communities," and are thus an extremely valuable resource in identifying and addressing issues of environmental justice.[266]

CONCLUSION

As the above discussion demonstrates, the EPA places considerable importance on information in the pursuit of the agency's environmental justice strategies. Since the foundation laid by Executive Order 12,898 in 1994, the EPA has expended considerable effort and resources to develop and improve information systems and tools to pursue strategic environmental justice goals, as well as environmental protection goals generally. This includes the development and utilization of information and informational tools for the EPA's own administrative and regulatory purposes, such as the agency's ambitious effort to develop the EJSEAT. This also includes the EPA's vigorous promotion of public access to information to further environmental justice and other environmental protection objectives through development of numerous online information databases and systems as well as mapping and GIS tools. The recent release of *Plan EJ 2014* impressively demonstrates an even further expansion of the EPA's commitment to development of information tools and strategies related to achieving the agency's environmental justice objectives.

These efforts have substantial value and the EPA has made admirable progress towards attaining the informational objectives

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[265] Weintraub, *supra* note 9, at 291.

[266] *Id.*

set forth in its strategic plans. Considerable additional progress will be required, however, before those informational objectives, as well as the related environmental justice goals of the agency, can be realized. As the NEJAC report assessing the EJSEAT rightly reflects, harnessing information for purposes of identifying and addressing environmental justice concerns is an extraordinarily difficult undertaking. In this regard, the NEJAC's report urged the EPA to develop more and better information and databases in order to improve the ability of the screening tool to assist in identification of environmental justice areas of concern.[267] At the time of release of the NEJAC report, the EPA had previously acknowledged that the EJSEAT "will remain a work-in-progress" until concerns raised by the NEJAC, including such development of new information sources and databases, are addressed.[268] In the recent release of *Plan EJ 2014*, the EPA reiterated that much work remains to be accomplished in the continuing development of informational tools such as the EJSEAT, including the ongoing and related effort to develop the plan's nationally consistent environmental justice screening tool.[269]

Environmental justice is an essentially forty-year-old movement and has been in a state of constant and rapid development over the past decades. From its grassroots origins in the early 1980s, the environmental justice movement has evolved into an amalgamation of "civil rights protest methods, legal principles and doctrines, and environmental protection theories, techniques, and approaches."[270] However, the movement's efforts over the past decades to utilize existing legal principles and doctrines to directly address environmental justice harms and impacts through litigation strategies have been criticized as largely unsuccessful.[271] For environmental justice communities

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[267] *See* NEJAC, Environmental Justice Screening Approaches, *supra* note 150, at 18-20.

[268] *Id.* at 18 ("During discussions with EPA Headquarters and the Regions, all parties concurred that EJSEAT will remain a work-in-progress as new databases are developed, features of the tool are evaluated in the field, and new opportunities emerge to improve its accuracy and usefulness.").

[269] *See supra* notes 174-78 and accompanying text.

[270] Hill, *supra* note 1, at 2.

[271] *See* Michael B. Gerrard, *Preface to the Second Edition*, *in* The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks xxxv, xxxv (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008) (noting that recent

experiencing a disproportionate burden of the risks and impacts of lawful pollution activities, lawsuits "must meet procedurally arduous legal requirements that, as it turns out, seldom prevail."[272] Moreover, litigation strategies have been argued to be not only ineffective in this regard, but also inefficient and potentially counterproductive to actually achieving environmental justice objectives.[273]

Legislative strategies have been similarly ineffectual. A number of states have enacted environmental justice legislation, but such measures reflect a "wide-range and variety of policy strategies and approaches" and only a relative few create concrete remedial strategies.[274] As it has with many areas in environmental law, Congress could rectify this with legislation incorporating a comprehensive national approach to environmental justice. Disappointingly, however, and despite a number of attempts since 1990, no federal environmental justice legislation has been enacted.[275]

As Michael Gerrard has observed, however, notwithstanding severe limitations on the ability of achieving redress of perceived environmental injustices through court action, "environmental justice continues to be of great importance in the political, policy, and administrative spheres."[276] The EPA's renewed emphasis on and prioritization of environmental justice over the last two years, especially through the comprehensive strategy reflected in *Plan EJ 2014*, compellingly validates that viewpoint. The lack of effective, consistent, and comprehensive judicial or legislative

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cases and existing doctrine have "severely limited the ability of plaintiffs to utilize the courts to take action against perceived environmental injustices"); Nick Christiansen, *Environmental Justice: Deciphering the Maze of a Private Right of Action*, 81 Miss. L. J. 843, 891 (2012); Monsma, *supra* note 5, at 446, 496 ("Attempts to craft justiciable claims for communities that incur a disproportionate share of the burden of lawfully regulated pollution have not proven successful as legal remedies, although the effort has led to a substantial body of legal scholarship.").

[272] Monsma, *supra* note 5, at 445.

[273] *See* Hill, *supra* note 1, at 228-29 ("The environmental justice movement . . . argues that the struggles within the movement are primarily political and economic and that legal remedies may be inappropriate, or even nonexistent.").

[274] *Id.* at 127, 159; Monsma, *supra* note 5, at 447.

[275] Hill, *supra* note 1, at 127; Monsma, *supra* note 5, at 446-47. For a discussion of some of the environmental justice related legislative proposals introduced in Congress, see Christiansen, *supra* note 271, at 847 n.15, 856-69.

[276] Gerrard, *supra* note 271, at xxxv.

avenues for addressing environmental justice impacts highlights the critical need for the EPA to continue pursuit of environmental justice goals through administrative and regulatory avenues. As an indispensible foundation of the agency's strategic environmental justice goals, the EPA's continuing efforts to develop and improve information systems and tools in furtherance of those goals is of vital importance.

ENVIRONMENTAL JUSTICE IN PERMITTING: STATE INNOVATIONS TO ADVANCE ACCOUNTABILITY

Alexandra Dapolito Dunn[*] *& Adam Weiss*[**]

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INTRODUCTION

Over the past two decades, significant progress has been made to bring environmental justice (EJ) considerations to the forefront of domestic environmental permitting, siting, and policy-making activities. When the increasingly coordinated voice of

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community grassroots organizations is combined with more focused EJ-oriented efforts on the part of the U.S. Environmental Protection Agency (EPA), state regulatory agencies, and permitted industries, EJ is no longer an afterthought in the context of most developmental and industrial activities. However, ensuring meaningful consideration of EJ issues in the decision making which surrounds these development and industrial activities—such that outcomes may change and true fairness and equity are promoted—requires accountability on all sides. EJ accountability can be promoted through a variety of mechanisms, including through regulation, policy, and law designed to require or promote environmental health and data reporting, community consultation and outreach, demographic studies, corporate personnel training, community capacity building, relevant combinations of local, state, or federal agency workgroups, and the application of EJ screening tools.

This Article reflects on the important role state agencies play in promoting fairness and transparency via the process of limiting and managing discharges to the environment through permitting or otherwise authorizing industrial and other developmental activities.[1] State authorities recognize the importance of meaningful public involvement in the permitting process for all communities.[2] However, to increase accountability, EJ concerns

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[1] *About Us*, ASS'N OF CLEAN WATER ADM'RS, http://www.acwa-us.org/#!about-us (last visited Feb. 5, 2012) ("Founded in 1961, the Association of Clean Water Administrators (ACWA) is a national, nonpartisan professional organization" whose "members are the State, Interstate and Territorial officials . . . responsible for the implementation of surface water protection programs throughout the nation. In addition to serving as a liaison among these officials, ACWA facilitates their communication with the Federal government and promotes public education.").

[2] Most EJ challenges appear in the permitting context rather than enforcement, cleanup, and standard setting. CLIFFORD RECHTSCHAFFEN, EILEEN GAUNA, & CATHERINE A. O'NEILL, ENVIRONMENTAL JUSTICE LAW, POLICY & REGULATION 249 (2d ed. 2009). This text is one of the best for teaching the subject of EJ in the law school curriculum. The authors note that permitting challenges are most significant on the state level because of the immediacy of the adverse impacts of permitting decisions. Discharges of toxic pollutants into waterways, air emissions, noise, odors, visual eye sores, and such all occur on the local level. *Id.* Since most often communities are only made aware of incoming facilities once the permitting procedures have been triggered, the need for meaningful public involvement earlier in the process is a critical step to mitigating disparities in environmental protection. *Id.* Stimulating meaningful public involvement early in the process would: "1) increas[e] the likelihood of tilting substantive outcomes in the direction of more equitable distribution of environmental

must be meaningfully integrated into facility[3] siting and permitting activities. If, as a part of this process, the regulated community is required to play a significant role, multiple benefits are achieved. In particular, community members can establish a relationship with the entities operating, or prospective facilities, in their neighborhoods early in the permitting process.[4]

This Article looks specifically at U.S. state policies and procedures that promote the consideration of EJ in environmental siting and permitting. Due to the maturation of the EJ field, today many state environmental agencies have well-established EJ programs and initiatives, which include dedicated EJ offices and staff,[5] EJ policies,[6] including those established by executive

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risks and rewards; and, 2) improv[e] the functioning of democratic processes in affected communities, the breakdown of which contributed to the disproportionate degradation of those communities in the first place." AM. BAR ASS'N & HASTINGS COLL. OF THE LAW, ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY STATE SURVEY OF LEGISLATION, POLICIES AND CASES xii (Steven Bonorris ed., 4th ed. 2010) [hereinafter ENVIRONMENTAL JUSTICE FOR ALL].

[3] In this Article, the term "facility" is used to refer broadly to industrial facilities as well as other development, such as retail, transportation, highways, and housing—essentially, those activities that can impact, disturb, or otherwise affect a neighborhood through increased traffic, noise, permanent buildings, reduced property values, or result in releases to air, water, and land.

[4] Early communication with the community benefits the permit applicant as well. It is financially advantageous to address the concerns of the affected citizens early on, rather than undergo costly litigation down the road, which could require changes to a facility already built. Telephone Interview with Dr. Mark Mitchell, Former President, Conn. Coal. for Envtl. Justice (July 15, 2011) (Dr. Mitchell provided the example of a particular recycling facility that was seeking to locate in Bridgeport, Connecticut and invited the community to the potential locations. The community was keen to not have the facility in a residential neighborhood. Through early meaningful community input, an agreement was reached as to where the facility would be located without having to engage in costly community opposition. Dr. Mitchell estimated the recycling facility saved $500,000 reaching the agreement early.).

[5] *See, e.g.*, OFFICE OF ENVTL. JUSTICE, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/public/65832.html (last visited Feb. 5, 2012) (The Office of Environmental Justice was created in October 1999, by the Department of Environmental Conservation to address EJ concerns and ensure community participation in the state's permitting process.); *see also*, OFFICE OF ENVTL. ADVOCATE, PA. DEP'T OF ENVTL. PROT., http://www.depweb.state.pa.us/environadvocate/site/default.asp (last visited Feb. 5, 2012).

[6] *See, e.g.*, MINN. POLLUTION CONTROL AGENCY, INCORPORATING ENVIRONMENTAL JUSTICE PRINCIPLES AND PRACTICES INTO MINNESOTA POLLUTION CONTROL AGENCY OPERATIONS (2008), *available at* http://www.pca.state.mn.us/publications/p-gen5-01.pdf (The Minnesota Pollution Control Agency updated its EJ policy in 2008 to ensure that minority and economically disadvantaged communities: (1) do not disproportionately

orders,[7] and advisory boards.[8] However, very few states have formal EJ procedures embodied in statute and regulation—which are arguably both the most accountable form of EJ procedure and more appropriate in situations where the matters at issue are highly susceptible to subjective interpretation.[9]

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bear environmental burdens; (2) are not denied equal access to environmental benefits; and (3) have opportunities for meaningful input in the development and implementation of environmental policies.); *see also* W. VA. DEP'T OF ENVTL. PROT., ENVIRONMENTAL EQUITY POLICY (2003), *available at* http://www.dep.wv.gov/environmental-advocate/Documents/EnviroEquityPolicy.pdf (stating that the DEP will, "within its authority, ensure that no segment of the population, because of its status as low-income or minority community or any other factors relating to its racial or economic makeup, bear a disproportionate share of the risks and consequences of environmental pollution or be denied equal access to environmental benefits").

[7] *See, e.g.*, N.J. Exec. Order No. 131 (Feb. 5, 2009) [hereinafter EO 131], *available at* http://www.state.nj.us/infobank/circular/eojsc131.htm. EO 131 found the following:

> The cumulative exposure to pollution and other hazards from multiple sources in communities whose residents are predominantly low-income and persons of color creates a disproportionate impact on the health, well-being, and quality of life of persons living in those communities and addressing those impacts requires a coordinated response across multiple governmental agencies and a more inclusive process of decision-making.

Id. Therefore, EO 131 directs all New Jersey state executive branch agencies to provide appropriate opportunities for all persons to participate in decision making and requires periodic review of programs that promote and protect the public health and the environment to ensure that they "address disproportionate exposure to environmental hazards." *Id.*

[8] *See, e.g.*, GLOBAL ENV'T RES. INC., REPORT OF THE COMMUNITY INVOLVEMENT ADVISORY COMMITTEE TO THE DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL (2001), *available at* http://www.dnrec.state.de.us/dnrec2000/Admin/BusServ/CIACReport.pdf (In September 1999, the Delaware Department of Natural Resources and Environmental Control (DNREC) chartered an external advisory committee, the Community Involvement Advisory Council (CIAC), to address barriers to inclusion of under-served populations in environmental decision making.); *see also* MD. CODE ANN., art. 41, § 18-315 (2003) (establishing, in 1997, the Maryland Advisory Council on Environmental Justice which created three subcommittees to focus on (1) public outreach, education and participation; (2) state and local interagency coordination; and (3) environmental health concerns and research).

[9] EJ procedures have most often been passed as nonlegislative rules—rules adopted as interpretative rules or statements of policy without formal notice and comment periods providing for public input. William Funk, *The Dilemma of Nonlegislative Rules*, JOTWELL (June 3, 2011), http://adlaw.jotwell.com/the-dilemma-of-nonlegislative-rules (identifying three limitations raised by nonlegislative rules: first, they are not accompanied with the extensive notice and comment periods that formal rulemakings include; second, the difficulty in determining when nonlegislative rules are ripe for judicial review; and third, what amount of deference a policy or nonlegislative rule should receive from a reviewing court). Therefore, promulgating

This Article reviews U.S. state initiatives that have been put in place to increase the level of EJ accountability, reporting, and process in facility siting and development projects. After a brief overview of the federal approach to EJ, this Article provides case studies of three state EJ approaches and their successes and limitations in implementation.[10] First, this Article reviews Illinois's EJ policy, finding that, while it stimulates public participation, accountability would be better served if the burden was shifted to the applicant to engage the public. Second, this Article assesses New York's EJ policy, which promotes an ongoing dialogue with stakeholders early on in the process and places the costs of ensuring that the public is informed on the permit applicants. Next, this Article examines Connecticut's statutory EJ approach, finding that it provides a process that furthers accountability and offers meaningful opportunities for concerned citizens to be heard. Finally, this Article concludes that these states can lead the way for others in showing how to ensure that EJ considerations are more than a mere check box exercise, and that systems with higher degrees of accountability[11] are the most appropriate in an arena so subjective that it is prone to be given inconsistent or ineffective consideration such as EJ.

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formal EJ laws allows a state to avoid these issues and provides an avenue for their citizens to hold the permit applicant and agency accountable on a matter open to subjective interpretations. However, passing a formal EJ bill can be difficult, as demonstrated by the Georgia legislature's proposal of an EJ law three times, which failed each time. ENVIRONMENTAL JUSTICE FOR ALL, *supra* note 2, at 65.

[10] This Article's focus on model state approaches does not intend to overlook other model approaches on the local level, as many local EJ initiatives present a ripe topic for further study. For example, in 2009, the City of Cincinnati passed an ordinance that required an "Environmental Justice Permit" for any proposed project which is likely to have a "material, cumulative, adverse impact on the health or environment of any [EJ] community . . . ." CINCINNATI, OHIO, ENVTL. CODE § 1041 (2009), *available at* http://library.municode.com/index.aspx?clientId=19996&stateId=35&stateName=Ohio. To apply for the EJ permit application, the applicant must submit comprehensive information which will then be mailed at the applicant's expense to any community council, hospital, school, daycare, or other key community stakeholder and ascertainable addresses located within one-mile of the proposed project. *Id.* Additionally, the EJ examiner can impose conditions on the project to mitigate effects of the proposed project including the requirement of a bond or surety to ensure compliance. *Id.* All proposed projects denied an EJ permit will be prohibited. However, due to the number and variety of local EJ initiatives, they are beyond the scope of this Article.

[11] *See infra* Section III.

I. U.S. ENVIRONMENTAL PROTECTION AGENCY'S APPROACH

The EPA's policies and procedures largely evolved following the signature of Executive Order (EO) 12898 on EJ.[12] As EO 12898 approaches its twentieth anniversary, the EPA is developing specific plans to revitalize EJ issues through Plan EJ 2014—a roadmap to integrate EJ concerns and meaningful participation[13] into cross-agency programs and policies.[14] In

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[12] *See* Exec. Order No. 12898, 3 C.F.R. § 859 (1994), *reprinted in* 42 U.S.C. § 4321 (2006). President Clinton's EO 12898, "Federal Actions to Address Environmental Justice In Minority Populations and Low-Income Populations," tasks each federal agency with "achieving [the] environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." *Id.*

[13] According to the EPA, "meaningful involvement" in environmental decision making means that:

> (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.

Environmental Justice Program and Civil Rights, EPA.GOV, http://www.epa.gov/region01/ej/index.html (last visited Feb. 5, 2012).

[14] Memorandum from Cynthia Giles, Assistant Adm'r for Office of Enforcement and Compliance Assurance, U.S. ENVTL. PROT. AGENCY, Request for Recommendations on Plan EJ 2014 and Permitting Charge to National Environmental Justice Advisory Council Members (July 27, 2010), *available at* http://www.nleh.org/wp-content/uploads/2010/10/EPA-EJ-Plan-20141.pdf. The plan outlines five cross-agency focus areas: (1) Incorporating Environmental Justice Into Rulemaking, (2) Considering Environmental Justice Concerns in the EPA's Permitting Process, (3) Accelerating Compliance and Enforcement Initiatives, (4) Supporting Community-Based Action Programs, and (5) Fostering Administration-Wide Action on Environmental Justice. *Id.* Executive Order 12898 also established the Federal Interagency Working Group on Environmental Justice (EJ IWG). The EJ IWG, is comprised of seventeen federal agencies and several White House offices, and tasked with guiding, supporting, and enhancing federal environmental justice and community-based activities. On August 4, 2011, the heads of the seventeen federal agencies took an important step in the administration's effort to support EJ by signing the Memorandum of Understanding on Environmental Justice and Executive Order 12898. *See* FEDERAL INTERAGENCY WORKING GROUP ON ENVIRONMENTAL JUSTICE, MEMORANDUM OF UNDERSTANDING ON ENVIRONMENTAL JUSTICE AND EXECUTIVE ORDER 12898 (2011), *available at* http://www.epa.gov/compliance/environmentaljustice/resources/publications/interagency/ej-mou-2011-08.pdf (broadening the EJ IWG to add additional agencies not named in EO 12898 as participants, and requiring each agency to finalize and publicize an environmental justice strategy, provide the public with annual implementation reports

September 2011, the EPA finalized the plan to, among other goals, specifically consider permitting implications "to ensure that environmental justice concerns are given as full consideration as possible in the decision to issue a permit and the terms of the permits issued under existing federal environmental laws," and "enable EPA to address the complex issue of cumulative impacts from exposure to multiple sources and existing conditions that are critical to the effective consideration of environmental justice in permitting."[15] Plan EJ 2014 is not a rule or regulation, but a strategy to help integrate environmental justice into the EPA's

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that discuss progress in carrying out the agency's EJ commitments, as well as focus on, when appropriate, the implementation of the National Environmental Policy Act, implementation of Title VI of the Civil Rights Act of 1964, impacts from climate change, and impacts from commercial transportation or goods movement). Through the Memorandum of Understanding, the EJ IWG also adopted a charter adding more structure and efficiency to the Workgroup to better coordinate their efforts. *See* CHARTER FOR INTERAGENCY WORKING GROUP ON ENVIRONMENTAL JUSTICE (2011), *available at* http://www.epa.gov/compliance/environmentaljustice/resources/publications/interagency/iwg-charter-2011.pdf. For an example of an agency progress report required by the Memorandum of Understanding, see U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE 2011 IMPLEMENTATION PROGRESS REPORT ON ENVIRONMENTAL JUSTICE (2011), *available at* http://www.justice.gov/ej/docs/doj-ej-impl-prog-rpt.pdf.

[15] U.S. ENVTL. PROT. AGENCY, PLAN EJ 2014 CONSIDERING ENVIRONMENTAL JUSTICE IN PERMITTING IMPLEMENTATION PLAN (2011), *available at* http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-permitting-2011-09.pdf. ACWA commented on the EPA's Permitting Draft Implementation Plan, encouraging the EPA to facilitate early and ongoing outreach to state environmental departments to obtain success stories and lessons learned in EJ programming generally and in permitting specifically. Furthermore, ACWA recommended that the EPA express in its final plan how it will work with the regulated community to specify how permit applicants will identify and notify EJ stakeholders, distribute readily understandable project information, and arrange public meetings. The letter emphasized the variety of experiences states have involving permittees in the public participation process which the agency should utilize as it develops an EJ toolkit. Comment Letter on Environmental Justice Plan 2014 Draft Implementation Plan—Considering Environmental Justice in Permitting from Alexandra Dunn, Exec. Dir. & Gen. Counsel, ACWA, to Lisa Jackson, Adm'r, U.S. ENVTL. PROT. AGENCY (Apr. 29, 2011), *available at* http://www.asiwpca.org/#!__letters. In addition, as this Article goes to publication, the EPA just released a new tool to add to its EJ resources in December 2011. *See* U.S. ENVTL. PROT. AGENCY, PLAN EJ 2014: LEGAL TOOLS (2011), *available at* http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/ej-legal-tools.pdf (identifying the numerous legal authorities under the environmental statutes administered by the U.S. EPA that may contribute in the effort to advance environmental justice under Plan EJ 2014, specifically by ensuring the agency's programs, policies, and activities fully protect human health and the environment in minority and low-income communities).

day-to-day activities.[16] It is important to note that the EPA is the permitting authority for several states that have not sought delegation of various environmental programs,[17] and thus the EPA has a real opportunity to lead by example when crafting and putting into place its final EJ permitting approaches.[18]

II. STATE APPROACHES

While the EPA continues to develop its roadmap, many states are already implementing their own approaches to consider EJ in permitting. States take a variety of different approaches to remedy disproportionate environmental impacts in the permitting process and promote EJ, each with varying degrees of effectiveness.[19] The first step many states take is to perform an EJ study to determine what types of solutions are necessary. To

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[16] While this Article explores state legislative efforts, in part, a natural line of inquiry is the value and possibility of federal EJ legislation. Congress has attempted to enact EJ statutes on a few occasions although none have been successful. *See, e.g.*, H.R. 2105, 103d Cong., (1993); H.R. 1924, 103d Cong., (1993). A detailed analysis of this possibility, however, is beyond the scope of this Article and is fertile ground for future exploration.

[17] The EPA is the permitting authority (PA) under some statutes and programs. For example, under the CWA, the EPA is the National Pollutant Discharge Elimination System (NPDES) PA in six states, on federal lands, and in the majority of Indian territories. *National Pollutant Discharge Elimination System (NPDES): Specific State Program Status*, EPA.GOV, http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=specific (last visited Feb. 5, 2012). As further illustration, the EPA is the permitting authority in two states under Resource Conservation & Recovery Act (hazardous waste), and one state under the Safe Drinking Water Act. *Delegation by Environmental Act*, ENVTL. COUNCIL OF STATES (Sept. 25, 2011, 1:00 PM), http://www.ecos.org/section/states/enviro_actlist.

[18] Notably, the Government Accountability Office released a November 2011 report finding that the EPA still lacks the resources and definitional precision needed to advance EJ issues. GAO also called for greater articulation of the state role. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, ENVIRONMENTAL JUSTICE: EPA NEEDS TO TAKE ADDITIONAL ACTIONS TO HELP ENSURE EFFECTIVE IMPLEMENTATION (2011), *available at* gao.gov/new.items/d1277.pdf.

[19] *See generally* ENVIRONMENTAL JUSTICE FOR ALL, *supra* note 2. The 2010 edition of the ABA/Hastings fifty state survey is considerably lengthier than previous editions, demonstrating that states continue to add to and experiment with innovative methodologies to address EJ. Steven Bonorris & Nicholas Targ, *Environmental Justice in the Laboratories of Democracy*, 25 A.B.A. SEC. NAT. RES. & ENV'T 44 (2010). Currently forty-one states have statutes, regulations, or other initiatives that further environmental justice, up from thirty-four identified in the 2007 edition. *Id.* This survey discussed these methodologies and provides links to each state's website for further detail.

accomplish this, states often then create an advisory board or commission, which are typically representative of the ethnic and racial makeup of the community to adequately represent the state's EJ concerns.[20] However, these commissions typically lack the power to change or implement policy.[21] Therefore, states also often create dedicated EJ offices and staff within the state environmental agency devoted to the development and implementation of EJ policies. Lastly, some states have passed EJ statutes and regulations that increase public participation, providing critical accountability.[22]

A. A Policy Approach—Illinois

Illinois has been called the state that best mirrors the country as a whole[23] based on how closely it matches national levels on twenty-one demographic factors, including: race, age, income, education, industrial mix, immigration, and the share of people living in urban and rural areas.[24] As the fifth largest state, Illinois has large urban areas, meaningful industrial concerns, significant agricultural presence, and transitional suburban areas. With many companies, and the state, continuing to invest in Illinois, the state is a prime place for environmental conflict.[25]

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[20] *See, e.g.*, *Environmental Justice Advisory Board Bylaws*, PENN DEP'T OF ENVTL. PROT., *available at* http://www.portal.state.pa.us/portal/server.pt/community/ejab/14051/ejab_bylaws/589422 (last visited Feb. 5, 2012). Pennsylvania DEP created an Environmental Justice Advisory Board comprised of "a broad cross-section of interests," including representatives of low-income and minority communities and affected industries. *Id.*

[21] *See, e.g.*, Robert W. Collin, *Environmental Justice in Oregon: It's the Law*, 38 ENVTL. 413, 445-48 (2008) (discussing that Oregon similarly had an Environmental Justice Advisory Board that was disbanded because of a lack of authority to make or enforce regulations and a lack of funding).

[22] *See infra* notes 55, 59.

[23] Stephen Ohlemacher, *How Average is Your State?*, ASSOCIATED PRESS (2007), http://hosted.ap.org/specials/interactives/wdc/average_state/index.html?SITE=AP.

[24] *Id.*

[25] *See, e.g.*, Press Release, Ill. Gov't News Network, Governor Quinn Announces Investment to Boost State's Manufacturing Industry, Keep Hundreds of Jobs in Illinois (Apr. 13, 2011), *available at* http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9334 (announcing a "$10.3 million business investment package to help Chicago-based steel manufacturer A. Finkl & Sons Co. expand operations. The state's investment will leverage about $150 million in private investment").

To strengthen the public's involvement in environmental decision-making and ensure communities are not disproportionately impacted by degradation of the environment, Illinois Environmental Protection Agency (IEPA) developed an EJ Public Participation policy.[26] The policy is triggered "when proposed Agency permitting activities . . . may significantly and adversely affect EJ areas or when the community has made the Illinois EPA aware of EJ concerns for the proposed Agency action."[27] The Public Participation Policy emphasizes early and meaningful public involvement throughout the permitting process.

Each Bureau's permit section is required to review all permit applications to determine which applications trigger this EJ Public Participation Policy. For the purposes of its EJ Policy, Illinois defines a "potential" EJ community as a low-income and/or minority population greater than twice the statewide average.[28] In addition, a community may be considered a potential EJ community if the low-income and/or minority population is less than twice the statewide average, but greater than the statewide average, and has identified itself as an EJ community. "If the low-income and/or minority population percentage is equal to or less than the statewide average, the community should not be considered a potential EJ community."[29]

If the EJ Public Participation policy is triggered, the IEPA will first encourage the permit applicant to engage community stakeholders in open dialogue early in the permitting process. In the course of the dialogue, "the applicant will be encouraged to provide notice to residents of the potential EJ area about the pending permit application and basic information about the project to interested residents."[30] The burden then falls on the

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[26] ILL. ENVTL. PROT. AGENCY, ENVIRONMENTAL JUSTICE PUBLIC PARTICIPATION POLICY, *available at* http://www.epa.state.il.us/environmental-justice/public-participation-policy.pdf [hereinafter Illinois Policy]. A new law has also passed both houses of the Illinois legislature and was signed into law on August 16, 2011. S.B. 2193, 97th Gen. Assemb. (Ill. 2011) (establishing the Commission on Environmental Justice and charging the Commission with advising state entities on EJ issues). Given the recent nature of the new Illinois law, this Article focuses on the state's existing policy.

[27] Illinois Policy, *supra* note 26, at 4.

[28] *Id.* at 1.

[29] *Id.*

[30] *Id.* at 5.

IEPA to make fact sheets and plain language summaries of the major aspects of the proposed project, including the purpose and location of the proposed activity and facility, any anticipated environmental impacts, and any controls or work practices that will limit those impacts.[31] All the public notices will be required to be "written in terminology and languages easily understood by the majority of readers" and when necessary, be made available on the agency's webpage and placed in local publications.[32]

Illinois's EJ policy puts the majority of the public outreach requirements with their related costs on the IEPA. This raises a question of whether state EJ policies which shift the burden to permit applicants are preferable to the Illinois approach because they allow the state environmental agency to hold the applicants accountable. Illinois's EJ policy makes the environmental agency responsible for community outreach, perhaps insufficiently holding the permit applicant accountable for explaining the possible disproportionate impacts of the proposed facility. This approach could also lead to uneven enforcement by the environmental agency without regular oversight of its implementation of the EJ policy to promote accountability.[33]

Illinois also has a local siting approval process under the Illinois Environmental Protection Act for Pollution Control Facilities (PCFs).[34] The local siting approval law is subject to a public participation process that requires providing notice of the application to adjacent property owners, local members of Illinois's General Assembly from the legislative district in which the facility is to be located, and notice to the general public by newspaper publication.[35] Moreover, at least one public hearing must be held and any person may comment on the proposed facility. Once the governing body issues their decision in writing, it may be appealed

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[31] *Id.*

[32] *Id.*

[33] However, Illinois's EJ bill, Pub. Act 097-0391, S.B. 2193, 97th Gen. Assemb. (Ill. 2011), was passed August 16, 2011 and establishes the Commission on Environmental Justice and charges the Commission with advising state entities on environmental justice issues. This law will allow for an oversight body of EJ issues, thereby creating greater accountability in the permitting process.

[34] PCFs include landfills, commercial incineration facilities, wastewater treatment plants, and similar waste treatment, storage or disposal facilities.

[35] 415 ILL. COMP. STAT. 5/39.2 (2007).

to the Pollution Control Board.[36] The IEPA is not a participant in this process, but they do ensure that the project has the requisite siting approval prior to the issuance of any development permits.[37] Therefore, while the siting process is not part of Illinois's formal EJ policy, it is an effective tool to hold all parties accountable and empower the affected communities with the ability to comment on and appeal a siting decision.

B. An EJ Permit Policy—New York

In 2003, the New York State Department of Environmental Conservation (NYSDEC) Commissioner issued Commissioner Policy CP-29 providing guidance for incorporating EJ concerns into the NYSDEC's permitting process. The policy requires the NYSDEC to first identify whether potential adverse environmental impacts from the proposed action are likely to affect a potential environmental justice area. This determination will be made using an integrated geographic information system and demographic application (GIS Application) which considers demographic census data of income and ethnicity.[38] Where a potential EJ area is identified, the applicant will be required to submit a written public participation plan. At a minimum, the plan must identify stakeholders to the proposed action, including local residents, elected officials, and community-based organizations. The plan must also contain methods of public outreach including information on how they will "[d]istribute and post written information on the proposed action and permit review process" in an easy-to-read, plain language format, and, when appropriate, translated into languages other than English.[39]

Permit applicants must also hold informational meetings throughout the permit review process at locations and times convenient to project stakeholders to keep information flowing.[40] In addition, applicants must "[e]stablish easily accessible

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[36] *Id.*

[37] *Id.*

[38] N.Y. DEP'T OF ENVTL. CONSERVATION, ENVIRONMENTAL JUSTICE & PERMITTING: DEC POLICY 7 (2003), http://www.dec.ny.gov/docs/permits_ej_operations_pdf/ejpolicy.pdf.

[39] *Id.* at 8.

[40] *Id.*

document repositories in or near the potential environmental justice area to make" pertinent project information available, "including but not limited to: application material, studies, reports, meeting presentation materials and media releases. The applicant may also establish a repository on the internet."[41]

"As part of the public participation plan submission," applicants must include a report summarizing: "all progress to-date in implementing the plan; all substantive concerns raised to-date; all resolved and outstanding issues; the components of the plan yet to be implemented and an expected time line for completion of the plan."[42] Upon completion of the public participation plan, applicants must submit written certification of compliance with the plan and a revised report detailing all activity subsequent to the initial report submission.[43] The applicant or their agent must submit a signed certification to DEC prior to a final application decision.[44]

The South Pier Improvement Project (SPIP) proposed by the Astoria Generating Company (AGC) near the Sunset Park community in Brooklyn, New York provides an example of the ongoing dialogue New York's EJ policy promotes. The Sunset Park community of approximately 150,000 people is considered a Potential Environmental Justice Area by the NYSDEC.[45] The SPIP energy project will improve the current Gowanus Generating Station through the addition of an approximately 100 megawatt combustion turbine generator.[46] The neighborhood is currently the site of multiple existing industrial facilities including a cement plant, warehouse, and utility switchyard, while additional facilities are also being proposed.

Before introducing the SPIP to the general public, AGC met with many community stakeholders, including local public interest groups, political representatives, and community leaders to obtain feedback on potential concerns and issues the community had with previous power generating projects. In

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[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] ESS GROUP, INC., FINAL ENVIRONMENTAL IMPACT STATEMENT: SOUTH PIER IMPROVEMENT PROJECT 133 (2009) [hereinafter IMPACT STATEMENT].

[46] *Id.* at i.

addition to the community outreach, AGC also met with the NYSDEC, the NYC Planning Department, and the NYC Department of Economic Development to anticipate all possible concerns.[47] Consistent with its open communication approach, a Public Participation Plan was prepared to facilitate significant public outreach. All project documents including fact sheets and stakeholder updates were made available through an extensive project website and at local libraries and the community board office. "In addition, comments were encouraged to be provided at public meetings, by mail, through the website, or via the established SPIP hotline."[48]

Furthermore, AGC performed a comparative assessment of asthma, cancer, heart disease, and mortality rates in Sunset Park compared to Brooklyn and New York City to evaluate the potential for additional adverse environmental and health impacts as a result of the SPIP.[49] The study found that the EJ community should not anticipate that the SPIP will contribute any additional environmental burden; rather, it will actually reduce the contribution of air quality components that may contribute to environmental and health impacts.[50]

During the community outreach efforts, the Sunset Park community expressed significant concern for a long-term commitment not to increase emissions.[51] As such, AGC voluntarily proposed a condition on each of their modified permits to waive their rights (or the rights of any successor) to increase emissions at the facilities. Additionally, through the SPIP, AGC promised to reduce operations of its existing facilities by approximately fifty percent and achieve approximately forty-nine percent actual overall emission reduction from current conditions, while adding to the overall capacity of the local electrical grid.[52]

The SPIP project offers a strong example of a proposed facility that engaged an EJ community according to New York's policy and took actions to balance industrial expansion, protection

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[47] *Id.* at iii.
[48] *Id.*
[49] *Id.* at 132-43.
[50] *Id.*
[51] *Id.* at iv.
[52] *Id.* at v.

of the environment, and the need to accommodate social and economic considerations. The final permit was granted in October 2009 and Astoria Generating Company continued to meet with community leaders, public officials, and interested stakeholders as the project came to fruition.

C. A Statutory Approach—Connecticut

Connecticut is a state of economic prosperity and disparity, ranking first in per capita income in the nation[53] yet having many cities at per capita incomes below $20,000.[54] Connecticut's EJ statute creates a transparent process by which the permit applicant must identify measures to facilitate meaningful public participation in the regulatory process and certify that they will undertake their proposed public outreach efforts.[55] While Connecticut's EJ statute does not cure the possibility of institutional bias from the siting process,[56] it provides an effective

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[53] *State Personal Income 2008*, U.S. BUREAU OF ECON. ANALYSIS (2009), http://www.bea.gov/newsreleases/regional/spi/2009/spi0309.htm.

[54] *2008 American Community Survey*, U.S. CENSUS BUREAU (2009), http://www2.census.gov/acs2008_1yr/summaryfile/ACS_2008_SF_Tech_Doc.pdf.

[55] An Act Concerning Environmental Justice Communities and the Storage of Asbestos-Containing Material, CONN. GEN. STAT. § 22a-20a (2009).

[56] The term "institutional racism" describes a pattern of society to impose in a covert manner oppressive or otherwise negative conditions against identifiable groups on the basis of race or ethnicity. *See generally* LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 167 app. (2001). Furthermore, environmental pollution laws may be unevenly enforced in poorer communities with little political power. Studies have found that higher penalties accrue and more rapid and thorough cleanups occur for environmental violations in non-minority communities. *See, e.g.*, Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law, A Special Investigation*, 15 NAT'L L.J. S2 (1992) (penalties substantially higher in communities with predominantly higher Caucasian demography); *see also* Rachel Morello-Frosch, Manuel Pastor, Jr., Carlos Porras & James Sadd, *Environmental Justice and Regional Inequality in Southern California: Implications for Future Research*, ENVTL. HEALTH PERSPS. (Apr. 2002), at 149, *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1241158/pdf/ehp110s-000149.pdf (finding that Latinos are twice as likely as whites to live within one mile of an EPA Toxic Release Inventory listed facility, and Latinos, African Americans, and Asian populations in the region face fifty percent higher cancer risks than Anglo-Americans in the region). The evidence of institutional environmental racism that these studies illustrate are not new findings. In 1987, the United Church of Christ's Commission for Racial Justice released an influential study which found the following:

process for informing Connecticut citizens of new and expanding facilities in their neighborhoods, and provides meaningful opportunities for engagement.[57]

Applicants seeking a permit from the Connecticut Department of Environmental Protection (DEP) or Siting Council,[58] for a facility that will be located or expanded in an EJ community, are required to file a "meaningful public participation plan" (MPPP) with the appropriate agency; consult with the elected official of the town or towns in which the facility would be located to evaluate the need for a Community Environmental Benefit Agreement (CEBA);[59] to develop accountability; and designate within the MPPP a convenient time and place to hold an informal public meeting with the residents of the affected EJ community.[60] The MPPP must also identify the methods by which the applicant will publicize the date, time, and nature of the

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> The proportion of minority members in communities with commercial hazardous waste facilities is double that of communities without such facilities. Where two or more such facilities are found, the proportion of minority members is nearly triple that in otherwise comparable communities. In fact, the best predictor of where to find hazardous waste is to classify communities by race, not income or real estate values.

COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

[57] As mapping that draws on Connecticut's census data indicates, Connecticut's pollution sources are heavily concentrated in minority and economically depressed communities. *Environmental Justice Maps of Connecticut*, CONN. COALITION FOR ENVTL. JUSTICE, http://www.environmental-justice.org/ej_maps/index.html (last visited Feb. 5, 2012). Connecticut also burns more trash than any other state. Telephone Interview with Dr. Mark Mitchell, Former President, Conn. Coalition for Envtl. Justice (July 15, 2011). The majority of the burning occurs outside affluent communities. *Id.*

[58] The Connecticut Siting Council is responsible for, *inter alia*:

> 1) balancing the need for adequate and reliable public utility services . . . with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values; 2) providing environmental standards for the location, design, construction, and operation of public utility facilities . . . that are sufficient to assure the welfare and protection of the people of Connecticut.

About Us, CONN. SITING COUNCIL, http://www.ct.gov/csc/cwp/view.asp?a=895&q=248310 (last visited Feb. 5, 2012).

[59] CONN. GEN. STAT. § 22a-20a (2009).

[60] *Id.*

informal public meeting using a variety of methods.[61] At the informal public meeting, the applicant is required to make reasonable and good faith efforts to provide clear, accurate, and complete information about the proposed facility and the potential environmental and health impacts.[62] The DEP or the Siting Council is not allowed to take any action on the applicant's permit, certificate, or approval earlier than sixty days after the informal public meeting.[63] Therefore, both the applicant and environmental agency are held accountable for stimulating public participation prior to beginning the permit application process.

In addition to the MPPP, applicants must consult with the chief elected official of the towns in which the affecting facility is proposed to be located or expanded so that the need for a CEBA can be evaluated.[64] A written agreement between a host town and developer to mitigate the environmental impacts of the proposed facility, entered into voluntarily, a CEBA is an effective tool for incorporating community concerns expressed during the required public participation meetings. By coming to a voluntary agreement with the city and community to mitigate the health concerns and protect neighborhoods from additional pollution before the formal hearing procedures, applicants can often save considerable expense and time as well as avoid political pressure from the community. Early cooperation with communities helps to avoid both the economic and social costs associated with facility opposition, while simultaneously increasing public involvement and perhaps also gaining the benefit of community support.

A proposal by the energy company, PSEG, to build three new natural gas peaking turbines on the site of its existing oil burning

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[61] These include: posting a reasonably visible sign on the proposed or existing facility property, posting a reasonably visible sign printed in all languages spoken by at least twenty percent of the population that reside within a one-half of a mile radius of the proposed or existing facility, notifying neighborhood and environmental groups, in writing, in a language appropriate for the target audience, and notifying local and state elected officials, in writing. *Id.* The applicant must also publish the date, time, and nature of the informal public meeting with a minimum one-quarter page advertisement in a newspaper having general circulation in the affected area not less than ten days and not more than thirty days prior to such meeting. Additionally, the applicant shall post a similar notification of the informal public meeting on the applicant's web site. *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

power plant (which would continue to operate) was the first project falling under the new EJ Act.[65] Diesel ships in the New Haven Harbor, the existing Harbor Station oil burning plant, and Interstate 95 already burdened the adjacent neighborhood with enormous amounts of pollution causing high rates of respiratory and cardiac disease.[66] The existing oil burning plant produced enough energy, so the $135 million project to build "peaking" generators was simply to help PSEG at times of maximum demand on the grid.[67] Concerns regarding the 130-foot exhaust stack and additional pollution in their already burdened neighborhood caused the community to begin to rise up against the proposal.[68]

As part of the MPPP under the EJ Act, an initial meeting took place where PSEG informed the public of their plan and the accompanying potential health and environmental impacts, and the public responded with their concerns. While the early exchange between the company, the neighborhood, environmental groups, and the city was unfruitful, it stimulated a series of negotiations and additional public meetings.[69] The parties ultimately agreed upon terms that were incorporated into a CEBA. PSEG agreed to reduce the maximum number of hours its current plants in New Haven will operate from fourteen to twelve hours per day and to contribute $500,000 to reduce air pollution in the neighborhoods surrounding the New Haven power plants.[70] The funds will be used to retrofit city garbage trucks servicing the area with diesel filters; to then install similar filters on equipment in the port district including cranes, payloaders, and bulldozers; and finally, to install power outlets in New Haven harbor to allow docked tugboats to receive cleaner power without using their

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[65] Roger Reynolds, *Land Use and Environmental Law: Law Helps Environmental Justice Take Step Forward*, CONN. L. TRIB. (Oct. 4, 2010), http://www.ctlawtribune.com/getarticle.aspx?ID=38461.

[66] *Id.*

[67] Allan Appel, *E. Shore Gas Turbines OK'd*, NEW HAVEN INDEP. (May 20, 2010), http://www.newhavenindependent.org/index.php/archives/entry/gas_turbines_on_the_way.

[68] *Id.*

[69] Reynolds, *supra* note 65.

[70] Thomas MacMillan, *Peaking Plant to "Green" Port*, NEW HAVEN INDEP. (Aug. 27, 2010), http://www.newhavenindependent.org/index.php/archives/entry/peaking_plant_to_green_port/id_28728.

polluting diesel generators.[71] Even with an additional three natural gas peaking turbines, these initiatives together result in a net decrease in pollution—a result with which the community can be satisfied.

In return for PSEG's commitment to no new added pollution, the community groups and their allies agreed to not oppose the company's request for permits to build its new peaking units in the city. All of the public outreach and negotiations occurred prior to PSEG submitting permit applications to the Siting Council or the DEP. With the community on their side as they submitted their permit applications, the DEP had a much easier decision to make. On May 19, 2011, as workers broke ground on the installation of new electricity generators in the harbor, the community was not only informed about the process, but also contributed significantly to mitigating the environmental and health impacts of another facility in their area.[72]

III. MOVING STATES FORWARD

In our system of cooperative federalism for environmental law and regulation, the federal government sets guidelines and baselines, and states carry out those functions and adapt them as needed to specific problems and challenges in their geographic area.[73] In the area of EJ, the federal government is leading by example through policy, plan, and actual permitting,[74] but because states are closer to EJ concerns, they have gone farther. The elements of accountability built into the Illinois, New York, and Connecticut programs are ripe for emulation by other states.

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[71] *Id.*

[72] Thomas MacMillan, *At Hearing, Peak Plant Plan Piques Neighbors*, NEW HAVEN INDEP. (Aug. 5, 2009), http://www.newhavenindependent.org/archives/2009/08/peaking_plant_p.php.

[73] Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 188 (2005) (finding that the field of environmental law has proven the most fertile ground for creating variations on the theme of cooperative federalism); *see also* Amy Widman, *Advancing Federalism Concerns in Administrative Law Through A Revitalization of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 YALE L. & POL'Y REV. 165, 177-78 (2010) ("[B]enefits of cooperative federalism are described as allowing for local, targeted solutions within a common regulatory framework; increasing manpower; and allowing for policy experimentation.").

[74] *See supra* Section I.

When looked at together, these state programs, through a variety of approaches, hold all parties accountable—state environmental agencies ensure the public is well-informed prior to issuing a permit, the permit applicants meaningfully engage the public on the effects of their proposed facility, and the affected communities must actively voice their concerns and desires.

While these public participation statutes and policies are important methods to mitigate environmental injustice, EJ policies would be even more successful if government and the courts addressed the distributional inequalities in the siting process. Solely relying on public participation policies places too heavy a responsibility on individual communities to protect themselves.[75]

Although many states have made great progress on EJ issues, the current economic downturn could potentially threaten these efforts as state environmental agencies are reducing staff, and state EJ offices are operating with fewer human and capital resources. Pressures to reduce the size of state government, and states operating in deficits,[76] will open the door to a risk of EJ becoming an afterthought rather than a forethought. Furthermore, these difficult economic times have prevented other states from developing their own EJ policies.[77] This means that states with a proven track record in this area must share with one

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[75] Uma Outka, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 237 (2005).

[76] For example, on July 11, 2011, Massachusetts Governor Deval Patrick signed into law the 2012 state budget, which included significant cuts to environmental agencies. Mathew Todaro, *Environmental Budget Cuts: Passing the Financial Burden to Future Generations*, RAPPAPORT BRIEFING (Sept. 15, 2011), http://rappaportbriefing.net/2011/09/15/environmental-budget-cuts-passing-the-financial-burden-to-future-generations/. In 2001, Massachusetts spent $245 million of its $22 billion total budget on the budgets for the Departments of Environmental Protection, Conservation and Recreation, and Fish and Game (slightly more than one percent of its total budget). *Id.* Today, the state plans to spend $160 million of its $30.6 billion budget on the same environmental programs (roughly 0.5 percent of its total budget). *Id.* That is nearly a fifty percent cut in just over ten years. *Id.*

[77] *See, e.g.*, ENVIRONMENTAL JUSTICE FOR ALL, *supra* note 2, at 158 ("While North Carolina does have an Environmental Justice Coordinator position, the General Counsel of the North Carolina Department of Natural Resources serves in that position. Due to a lack of funding, one person cannot be assigned to concentrate on EJ issues. Also due to a lack of funding, NC DENR has not had the opportunity to build upon their policies and programs to promote environmental justice.").

another the successes and failures of their EJ initiatives. States can use webinar and conference-call technology to exchange with one another experiences to benefit both the environment and communities when considering EJ early in the permitting process.

EJ is not a luxury that can be shifted to a lower priority status during difficult economic times. Communities of reduced socioeconomic status and of color deserve fair treatment and equitable consideration when it comes to impacts on their environment and health, regardless of the economy. In fact, times when even community groups are operating under budget constraints, making it potentially less likely that they will have the ability to vigorously engage in the permitting process, are exactly the times that more formal procedures are needed to ensure their consideration.

Communities in need of paying jobs may be drawn into accepting a downgrade in their physical, mental, and environmental health of the community. The phenomenon of "environmental blackmail,"[78] or "environmental jobmail,"[79] can lead to disparate exposure to environmental hazards. A community in need of work might not oppose a proposed facility in their neighborhood or participate in the public outreach activities threatening future employment opportunities.[80] The immediate

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[78] Robert Bullard, *Environmental Blackmail in Minority Communities*, *in* RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS 83-85 (Bunyan Bryant & Paul Mohai eds., 1992). Bullard discusses environmental elitism and job blackmail. He states: "The public is led to believe there is no alternative to 'business as usual' operation. If workers want to keep their jobs, they must work under conditions which may be hazardous to them, their families, and their community." *Id.* In addition, Bullard notes that "[t]he offer of a job (any job) to an unemployed inner city worker appears to have served a more immediate need that the promise of a clean environment." *Id.*

[79] Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 38-39 (1995) ("Accepting the jobs-for-environment tradeoff presents a tragic predicament for those living in low income and minority communities: risk one's job (and the economic viability of the community) if environmentally harmful activities are challenged; or risk one's health (and the community's health) if environmentally harmful activities are not challenged.").

[80] *See, e.g.*, Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775, 820-21 (1998) (examining the EJ movement from the perspective of the residents of Chester, Pennsylvania). Foster notes that early in a public hearing to challenge yet another industrial facility, a young man from the community stood up and said, "I don't care what they do, I need a job." *Id.* at 820.

need to provide for one's family will almost always prevail over a future possible detrimental health or ecosystem effect. Lean economic times make it all the more important that state permitting authorities incorporate EJ into their operations and promote accountability, thereby helping to insulate against "environmental jobmail."

CONCLUSION

When our nation's cities developed, there was little consideration for creating a balance between industrial space and living communities. Soot on windowsills was ordinary, and if employment led to adverse health later in life, it was unfortunate but not unexpected. Over time, a large number of industrial facilities became concentrated in communities of lower socioeconomic status, leading to proved disproportionate health and environmental outcomes across the U.S. The advent of the civil rights movement, and subsequent study and mobilization, as well as the growing effectiveness of citizen advocates, brought on the modern domestic EJ movement in the 1970s and 1980s. The federal government brought EJ even further forward with the adoption of EO 12898. As true laboratories, states followed the federal lead, developing their own programs and initiatives to address EJ. Today, both federal and state programs continue to mature, expand, and increase effectiveness.

When subjective considerations like fairness and equity are at issue, accountability is key. The states with EJ policies and even statutes with a variety of accountable and required steps will be more successful than those with softer approaches. Given the economic downturn, the best interests of EJ communities can be most reliably considered through clear and non-optional processes. In the end, such accountable approaches enhance certainty and successful outcomes for all parties involved—government, business, and the communities they serve.

Foster explains that this man was paid off and promised employment. She explains, "the facilities were following the time-honored practice of businesses hoping to move into financially ailing communities, and offering financial incentives and increased employment opportunities." *Id.* at 820-21.

THE POWER OF COMMUNITY ACTION: ENVIRONMENTAL INJUSTICE AND PARTICIPATORY DEMOCRACY IN MISSISSIPPI

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INTRODUCTION

The environmental justice movement seeks, on a fundamental level, to provide clean, healthy, and safe living conditions for all, regardless of race or socioeconomic status. Rose Johnson, a former chair of the Mississippi chapter of the Sierra

Club as well as a homeowner battling water contamination and wetland destruction in her neighborhood in North Gulfport, Mississippi, has described her quest for environmental justice as a "fight[] for our God-given right to have clean water, clean air, good schools, good homes . . . . [t]o make [our neighborhood] a healthier and cleaner place to live . . . . [n]ot just for my community, but for all minorities and poor people."[1] Johnson's words demonstrate that the environmental justice movement, at its heart, is working to guarantee a basic and fundamental right for all of society—the right to live, work, and play, free from the pervasive presence of toxic pollutants.[2]

For the past three decades, the movement has consistently worked toward eliminating the disproportionate exposure of minority and low-income communities to toxic risks and hazardous conditions. In 1982, protestors in Warren County, North Carolina, brought national media attention to the siting of a toxic waste landfill in a predominantly black area of the state.[3] From that point forward, local activists and community leaders became increasingly more vocal and organized in terms of promoting community awareness of contaminated and hazardous conditions.[4] Specifically, the public has turned to protesting unjust conditions in their areas, holding community meetings and attending public hearings regarding contaminated properties,

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[1] Janisse Ray, *Stopping Developers with an "African Drumbeat,"* SIERRA MAGAZINE, May/June 2004, *available at* http://www.sierraclub.org/sierra/200405/profile.asp.

[2] *See generally* PATRICK NOVOTNY, WHERE WE LIVE, WORK AND PLAY: THE ENVIRONMENTAL JUSTICE MOVEMENT AND THE STRUGGLE FOR A NEW ENVIRONMENTALISM 1-9 (2000).

[3] *See generally* LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 19-33 (2001); Charles Lee, *Beyond Toxic Wastes and Race, in* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 41, 49 (Robert D. Bullard ed., 1993); Robert D. Bullard & Beverly Wright, *Disastrous Response to Natural and Man-made Disasters: An Environmental Justice Analysis Twenty-Five Years after Warren County*, 26 UCLA J. ENVTL. L. & POL'Y 217, 221-24 (2008).

[4] *See* Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 8 & n.15 (1998). "[E]nvironmental justice activists appeared on the environmental protection scene, opposing industrial practices, and criticizing conventional environmental organizations and environmental protection agencies as racist and classist. They argued that privileged white people systematically receive the benefits of environmental protection while poor people of color systematically incur the environmental risk." *Id.* at 8 (internal citations omitted).

advocating for legislative changes, and even initiating lawsuits to remedy the hazardous conditions caused by environmental risks.[5]

Though President Clinton issued Executive Order 12,898 in 1994 to require federal agencies to consider issues of environmental justice,[6] proponents of the movement have yet to push through environmental justice legislation at the federal level.[7] Several states, however, have issued proclamations or enacted laws promoting community awareness and equity in environmental decision-making. In the absence of federal and state laws specifically governing instances of environmental injustice, affected communities, including several in Mississippi, must generally turn to litigation in order to see any meaningful resolution of the toxic conditions and environmental hazards that negatively impact the places where they live, work, and play.[8]

Focusing on two Mississippi communities, this Article examines potential remedies available to local activists seeking equal access to home and work environments not overburdened by environmental risks or toxic conditions. Part I of this Article examines the difficulties of defining precisely what is meant by *environmental justice*, which encompasses the ideas of *environmental racism* and *environmental equity*. Moreover, the idea of the environment as more than simply a community's physical and natural surroundings is central to further defining the goals of the environmental justice movement. Though the debate over terminology may seem futile or unimportant, exacting a more precise definition of *environmental justice* is essential to understanding the mission of the environmental justice movement

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[5] *See id.* at 12-13 ("Since these initial protests, residents from low-income communities and people of color have become increasingly self-organized and vocal in a wide range of environmental law settings. On the local level, they attend public hearings concerning polluting facilities and contaminated properties. They also litigate under civil rights laws to address disparity in environmental protection and have begun to participate in private enforcement efforts through citizen suit provisions." (internal citations omitted)).

[6] Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

[7] *See* Faith R. Rivers, *Bridging the Black-Green-White Divide: The Impact of Diversity in Environmental Nonprofit Organizations*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 449, 462 (2009) ("To date, however, the movement has been unsuccessful in efforts to shepherd environmental justice legislation through the Congress.").

[8] *See generally* NOVOTNY, *supra* note 2.

as well as encouraging community involvement in furthering this movement's goals.

Part II of this Article provides an overview of the environmental justice movement and highlights key investigative findings establishing the fact that low-income and minority communities do bear a higher burden in terms of environmentally hazardous conditions and toxic surroundings. Part III examines two Mississippi communities facing previous and ongoing environmental hazards that resonate with environmental justice concerns. The first of these communities, Turkey Creek, is predominantly black and located just outside of Gulfport. Turkey Creek residents have, for the past decade, battled developers seeking to fill the wetlands adjacent to their community, which would worsen area flooding and risk the destruction of neighborhood homes, schools, and churches. The second, Eastmoor Estates, is a low-income housing community located in the Mississippi Delta. For several years, Eastmoor residents have been contending with the property owner's unwillingness to repair the complete failure of their sewage system and subsequent contamination of their yards and homes. Turkey Creek and Eastmoor Estates are currently at different stages in their quest to remedy the environmental hazards affecting their neighborhoods—Turkey Creek residents have succeeded, both in and out of court, with various initiatives to protect their wetlands from succumbing to commercial development, whereas Eastmoor Estates has recently filed suit seeking a permanent injunction against Glenn Miller—the community's owner—to require him to repair the deteriorated sewer system.[9]

Part IV examines potential remedies for communities adversely affected by hazardous environmental conditions. Part IV-A considers the possibility of remedying instances of environmental injustice at the legislative level, while Part IV-B contemplates the same possibility at the community level. Part IV-C addresses the viability of litigation, determining that the decision to bring the environmental justice complaints out of the community and into the courtroom is not always in the community's best interest. In order for a community to

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[9] *See infra* Part III.

successfully fight instances of environmental injustice, residents cannot always rely on litigation alone.[10] Problems inherent in the legal system often hinder the justice that these affected communities seek and, perhaps more importantly, require in order to have healthy, clean, and safe surroundings.[11]

This Article concludes that these Mississippi communities would be in the most ideal position to remedy environmental injustice by first organizing themselves at the local level to combat inequities. By doing so, the community will be better prepared to overcome the political barriers that often prevent low-income and minority environmental justice plaintiffs from seeing success in the courtroom should litigation prove necessary to provide an ultimate resolution to the community's environmental burdens. As in the case of the Turkey Creek community along the Mississippi Gulf Coast, litigation combined with effective community action has proven successful in preserving the environmental integrity of the historically black neighborhood. The key to Turkey Creek's numerous victories over developers seeking to destroy the neighborhood's protective wetlands has been combining legal efforts with the community's sense of identity and commitment to preserving its historic vitality and independence from neighboring Gulfport. Turkey Creek's successes can be a powerful educational tool for other local communities, including Eastmoor Estates, as residents consider pursuing litigation as a remedy for the environmental injustice that threatens their neighborhoods, homes, workplaces, and schools.

I. FROM ENVIRONMENTAL RACISM TO ENVIRONMENTAL JUSTICE

Though the inherent unfairness of the circumstances in Warren County, North Carolina is clear, pinpointing the terminology central to the resulting social justice movement, and thus defining the movement's ultimate goals, has proven

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[10] *See* Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 648-49 (1992) [hereinafter Cole, *Empowerment*] ("Poor people and people of color also understand that most problems faced by their communities are not legal problems, but political and economic ones . . . . [Therefore, u]sing a legal strategy, rather than a political one, would likely fail these communities . . . ." (internal citations omitted)).

[11] *See id.*

difficult.[12] The overarching theme in the fight to promote *environmental justice* is to protect racial minorities and low-income communities from an undue exposure to toxic conditions.[13] Over the past several decades, proponents of environmental justice have been dismayed to find that the government's response to their movement has, in actuality, been to advance the policy goal of *environmental equity*.[14] The Environmental Protection Agency has defined environmental equity as "equal protection from environmental hazards for individuals, groups[] or communities regardless of race, ethnicity, or economic status."[15] This term accurately reflects the need to equally disseminate the benefits and burdens of environmental hazards throughout a community; however, because the term *environmental equity* does not sufficiently address advocates' concerns of racism and communities' quest for justice, the term is not expansive enough to cover the broader goals that the environmental justice movement hopes to achieve.[16]

At the other end of this spectrum is the concept of *environmental racism*. As the situation in Warren County culminated in protests and arrests, Benjamin Chavis, the director of the Commission for Racial Justice of the United Church of Christ, coined the term *environmental racism* to describe the events in North Carolina, pointing to the rampant racial discrimination in policy making, the enforcement of environmental regulations, and the siting of toxic waste facilities

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[12] *See, e.g.*, Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & COM. 597, 603-05 (1996) (noting that the environmental justice movement "has been known by several different names. The names with the most currency are: environmental racism, environmental equity, and environmental justice.").

[13] *See* COLE & FOSTER, *supra* note 3, at 10 (describing the origin of the undue burden shouldered by low-income and minority communities as "social and economic policies that subject [these communities] to daily environmental hazards").

[14] *See id.* at 15 (noting that "government agencies and industry groups prefer the term 'environmental equity,' because they feel it 'most readily lends itself to scientific risk analysis' and avoids those sometimes controversial terms 'racism' and 'justice'" (internal citation omitted)).

[15] U.S. ENVTL. PROT. AGENCY, CORE LIST FOR AN ENVIRONMENTAL REFERENCE COLLECTION 46 (2010) (EPA 260-B-10-001).

[16] *See supra* note 14 and accompanying text.

in minority communities.[17] Other explanations of environmental racism have expanded Chavis's definition, with Robert Bullard noting the economic relationship inherent in the use of the term: "Environmental racism combines with public policies and industry practices to provide *benefits* to whites while shifting industry *costs* to people of color."[18] By characterizing environmental racism in this manner, Bullard highlights the intent of environmental decision-makers to force environmental harms onto those minority populations unlikely to fight the resolution.

Environmental racism, for the most part, has been discarded by proponents of the environmental justice movement as too restrictive of a term for the inequitable distribution of environmental hazards.[19] Many siting decisions or environmental enforcement inaction may have a disproportionate effect on minority communities and can be accurately identified as environmental racism; however, less restrictive terms such as *environmental justice* expand the movement to other disadvantaged populations and capture the political aspects of environmental decision-making as it applies to environmental justice communities.[20] To equally apply the movement's aims to both racial minorities and low-income, economically disadvantaged populations, activists and scholars generally prefer to use the term *environmental justice* to describe the need for all

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[17] Benjamin F. Chavis, Jr., *Foreword*, *in* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 3, 3 (Robert D. Bullard ed., 1993).

[18] ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 98 (2d ed. 1994) (emphasis in original).

[19] COLE & FOSTER, *supra* note 3, at 15-16; *see also* Torres, *supra* note 12, at 604 ("[T]here are events that fit within a sub-category of the general term 'environmental justice' that are deserving of the classification 'environmental racism.' The clear identification of that sub-category of activities calls for a separate remedial focus. . . . [E]nvironmental racism is a subset of a more general category of inquiry that has as its object a close examination of the distributional effects of environmental policy. . . . The specific theory of justice that underlies the environmental justice movement is informed by the moral and constitutional position of the anti-racism struggle of the civil rights movement, but it has a broader reach.").

[20] *See* COLE & FOSTER, *supra* note 3, at 16 ("[E]nvironmental justice requires democratic decision making, community empowerment, and the incorporation of social structure—for example, existing community health problems, cumulative impacts of preexisting environmental hazards, the effect of segregative housing patterns—in environmental decision-making processes.").

Americans, regardless of race or economic status, to have consistent access to a clean, healthy home and workplace.

To define instances where non-racially based populations are disproportionately exposed to environmental harm, the EPA has adopted the more inclusive term *environmental justice* as opposed to *environmental racism*.[21] The EPA has consistently described environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[22] According to Luke W. Cole and Sheila R. Foster, the core of the environmental justice movement is "community self-determination," which requires public participation in the form of a "substantive dialogue among administrators, experts, and affected communities along with the opportunity for affected communities to influence the decision-making process."[23] As the following case studies from Mississippi will demonstrate, the need for collaborative community involvement in environmental decision-making from an early stage is essential for success in combating environmental injustice.

Because the disparity in the usage of these terms may appear trivial, many assume the terms to be interchangeable; however, the inherent differences among the three can be helpful in pinpointing precisely what type of social interactions are being examined within the broader scope of the movement now generally categorized as the *environmental justice* movement.[24] The possible definitions for environmental justice are endless; yet, at its most basic level, *environmental justice* is simply assuring that everyone, regardless of race or socioeconomic class, has access to "a clean, safe[,] and healthy environment."[25] From this

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[21] *See* U.S. ENVTL. PROT. AGENCY, TOOLKIT FOR ASSESSING POTENTIAL ALLEGATIONS OF ENVIRONMENTAL INJUSTICE (2004) (EPA 300-R-04-002), *available at* http://www.epa.gov/compliance/ej/resources/policy/ej-toolkit.pdf.

[22] *See id.* at 9.

[23] COLE & FOSTER, *supra* note 3, at 16; *see also* Anne E. Simon, *Valuing Public Participation*, 25 ECOLOGY L.Q. 757 (1999) (demonstrating the need for environmental decision-making processes to be transparent and permeable).

[24] *See supra* note 19 and accompanying text.

[25] Shijuade Kadree, *It's Getting Harder to Breathe: Addressing the Disproportionate Impact of Asthma Among Minority Children Through Environmental Justice Litigation*, 3 REG'L BLACK L. STUDENTS ASS'N L.J. 51, 59 (2009).

standpoint, achieving environmental justice for low-income and minority communities is tantamount to preserving their fundamental rights. In essence, environmental justice lies at the crossroads of civil rights and environmental law.[26]

In order to fully recognize the goals of the environmental justice movement, however, the traditional meaning of the "environment" must be expanded beyond the scope of both the federal environmental laws as well as the typical lay mindset.[27] Federal statutes, such as the Clean Air and Clean Water Acts, conceptualize the environment as an omnipresent object—the air we breathe and the water we drink. While this notion is key to understanding environmental justice since many of the toxins contaminating minority communities are found in the air or local water supply, the fact remains that this idea of the environment as "nature" only considers a small portion of the "environment" that is significant to environmental justice advocates.

According to Patrick Novotny, the concept of the environment, from an environmental justice standpoint, should be envisioned as "where we live, work[,] and play."[28] The idea that the environment can encompass a family's home, a person's workplace, and a child's school and playground is vital to the success of the environmental justice movement. Reconceptualizing the idea of the environment as "where we live, work[,] and play," has opened the movement's reach to include "affordable housing, community services, and other problems not typically thought of as a part of the environment."[29] This more personalized, more intimate conceptualization of the environment has much more significance to the average member of a community plagued by hazardous waste or toxic chemicals than the generic view of the

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[26] Michael Foard Heagerty, *Crime and the Environment–Expanding the Boundaries of Environmental Justice*, 23 TUL. ENVTL. L.J. 517, 521 (2010); *see also* Torres, *supra* note 12, at 604 ("The specific theory of justice that underlies the environmental justice movement is informed by the moral and constitutional position of the anti-racism struggle of the civil rights movement, but it has a broader reach.").

[27] *See* COLE & FOSTER, *supra* note 3, at 16 (describing the environment in the broader context of "where we live, where we work, where we play, and where we learn." (citing Charles Lee, *Environment: Where We Live, Work, Play, and Learn*, 6 RACE, POVERTY & THE ENVIRONMENT (Winter-Spring 1996), at 6)).

[28] NOVOTNY, *supra* note 2, at 3; *see also* Lee, *supra* note 27, at 6.

[29] *See* NOVOTNY, *supra* note 2, at 2-3.

environment as "nature."[30] By visualizing the environment as a place that is at the very core of daily life, members of affected communities are much more likely to actively protest the unjust conditions that threaten their health and well-being.[31]

II. THE ROAD TO ENVIRONMENTAL JUSTICE: THE EARLY MOVEMENT

In reaction to the rampant dumping of toxic chemicals and the siting of hazardous waste facilities in low-income and minority communities, grassroots activists gradually emerged as a strong force against the toxic wastes and contaminated resources plaguing their communities.[32] These early days of the environmental justice movement first captured the attention of civil rights leaders, academics, and media outlets on a national level in 1982, following a series of protests in the principally black community of Warren County, North Carolina, which was selected as the disposal location for soil contaminated by toxic polychlorinated biphenyls (PCBs).[33] Though more than 500 activists publicly opposed the siting decision and were subsequently arrested during the Warren County protests, the construction of the landfill continued as scheduled.[34] At the time, the battle for clean and healthy living conditions in the low-income, black communities of Warren County appeared to be lost; however, on a

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[30] *See* COLE & FOSTER, *supra* note 3, at 16 ("[T]he preservation of wildlife and wilderness [are] concerns that are just not central to the everyday survival of poor communities and communities of color."); *see also* Regina Austin & Michael Schill, *Black, Brown, Red, and Poisoned*, *in* UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 58 (Robert Bullard ed., 1st ed. 1994) (indicating that the mainstream environmental movement "has its priorities skewed" because it prioritizes wildlife preservation over the health and well-being of people and their communities).

[31] *See* COLE & FOSTER, *supra* note 3, at 33 ("Environmental justice activists usually have an immediate and material stake in solving the environmental problems they confront; they realize the hazards they face affect the communities where they *live* and may be sickening or even killing them or their children." (emphasis in original)).

[32] *See generally* Robert D. Bullard, *Introduction*, *in* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 7, 8 (Robert D. Bullard ed., 1993); COLE & FOSTER, *supra* note 3, at 10-13.

[33] Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class As Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921, 921 (1992).

[34] *Id.*

national level, the war against environmental injustice had just begun.

After being arrested for his role in the demonstrations in North Carolina, Walter E. Fauntroy, a congressman from the District of Columbia and the chairman of the Congressional Black Caucus, called upon the U.S. General Accounting Office (GAO) to scrutinize the racial composition and socioeconomic status of the communities surrounding major hazardous waste landfills.[35] Focusing on four landfills in the Environmental Protection Agency's Region IV, comprised of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee, the GAO report found a significant correlation between the location of the landfills and the social composition of the neighboring communities.[36] Specifically, based on the available census data, three of the four studied landfills were located in areas with a majority black population, and all four communities surrounding the facilities had a black population living at or below the poverty level.[37] Building on the situation in Warren County, the GAO study brought national attention to the fact that, at least in the southeastern United States, racial minorities and communities stricken by poverty were much more vulnerable to environmental harm than their white or more affluent counterparts. Though the study did not delve into the question of *why* the sites were selected, the fact that a positive correlation existed between the communities selected for hazardous waste sites and the existence of minority or low-income populations was a significant enough finding to encourage further research as to whether instances of environmental injustice were a regional phenomenon or a nationwide epidemic.

Following the publication of the GAO report, the United Church of Christ's (UCC) Commission for Racial Justice conducted a nationwide study of hazardous waste landfills to determine if

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[35] *Id.*; *see also* U.S. GEN. ACCOUNTING OFF., SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983).

[36] U.S. GEN. ACCOUNTING OFF., *supra* note 35, at 1-2.

[37] *Id.* at 2-3. The three hazardous waste landfills central to this study were Chemical Waste Management in Sumter County, Alabama; Industrial Chemical Company in Chester County, South Carolina; and the PCB landfill in Warren County, North Carolina. *Id.*

the GAO's findings were also applicable at the national level.[38] The UCC's study confirmed that, throughout the country, hazardous waste facilities were regularly sited in poverty-stricken communities or in areas with a significant minority population.[39] To be exact, the UCC study indicated that communities with at least one hazardous waste landfill had almost double the percentage of minorities than communities lacking hazardous waste facilities altogether.[40] Moreover, as the number of waste facilities within a given community increased, the percentage of minorities present in that area increased proportionally.[41] The UCC report emphasized that, though a community's socioeconomic status remained an important variable in the siting of hazardous waste facilities, the racial makeup of the area was the primary determining factor when making siting decisions.[42]

Further studies over the following decade slowly degraded the previous assumption that the burden of pollution is equally borne by all members of a community. As concern mounted regarding reported instances of low-income and minority communities facing greater environmental burdens, researchers found that the federal environmental laws were not being applied equally between white communities and those with high percentages of minorities.[43] Lavelle and Coyle's 1992 *National Law Journal* (NLJ) study refuted the prevailing notion that federal authorities enforced environmental laws equally among white and minority populations.[44] The study indicated that the environmental penalties levied for air, water, and waste pollution in minority areas were approximately forty-six percent lower than

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[38] Mohai & Bryant, *supra* note 33, at 921-22.

[39] COMM'N FOR RACIAL JUSTICE: UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 13 (1987); *see also* Mohai & Bryant, *supra* note 33, at 922.

[40] COMM'N FOR RACIAL JUSTICE, *supra* note 39, at 13.

[41] *Id.*; *see also* Mohai & Bryant, *supra* note 33, at 922 ("Where two or more such facilities are located, the proportion of residents who are minorities is more than triple.").

[42] COMM'N FOR RACIAL JUSTICE, *supra* note 39, at 23.

[43] Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1-S12.

[44] *Id.*

penalties issued in predominantly white communities.[45] Overall, this study demonstrates that, as Lavelle and Coyle stated, "[t]here is a racial divide in the way the U.S. government cleans up toxic waste sites and punishes polluters. White communities see faster action, better results[,] and stiffer penalties than communities where blacks, Hispanics[] and other minorities live."[46] In terms of the federal environmental regime at the time the NLJ study was published in 1994, minorities, regardless of their socioeconomic status, were less likely to receive the full force of governmental protection from environmental harms, thereby exacerbating the harm that minority and low-income populations faced in light of environmental contamination within their communities.

As the quest for environmental justice attracted increasing attention by both academics and the media, social scientists and legal scholars alike made it their mission to educate the public as to the reality of the disproportionate environmental burden borne by minorities and the poor in America. For sociologists like Robert Bullard, the simple fact is that low-income and, to a greater extent, minority communities bear a far greater burden in terms of negative exposure to environmental hazards.[47] According to Bullard, "[w]hether by conscious design or institutional neglect, communities of color in urban ghettos, in rural 'poverty pockets,' or on economically impoverished Native-American reservations face some of the worst environmental devastation in the nation."[48] It is this devastation that environmental justice advocates have been fighting during the past three decades, and the state of Mississippi has certainly been no stranger to such battles in recent years.

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[45] *Id.*

[46] *Id.* at S1.

[47] *See* Bullard, *supra* note 32, at 7-13.

[48] Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, *in* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 17 (Robert D. Bullard ed., 1993).

III. ENVIRONMENTAL INJUSTICE IN MISSISSIPPI

A. Turkey Creek—Harrison County, Mississippi

The brackish waters of Turkey Creek wind through the southernmost reaches of Mississippi and into the town of Gulfport, where casinos and hotels line the coast and attract bustling crowds of tourists each year. The vibrant lights and sounds of the casinos are a far cry from what can be seen and heard in the Turkey Creek area of North Gulfport. Established in 1866 by recently emancipated African Americans, the 320 acres that originally formed the Turkey Creek community were home to a vast assortment of plants and wildlife that shaped "one of North America's most diversified natural habitats."[49] Over time, the settlers of the Turkey Creek area developed sustainable agricultural practices and furnished their own water supply from deeply drilled water wells, contributing to their success as a community fully independent of the prosperous neighboring town of Gulfport.[50] The prevalence of local customs, practices, and traditions only strengthened Turkey Creek's identity as an autonomous African American community that has remained true to its heritage.[51] In recognition of Turkey Creek's endeavors to preserve its history and culture, the community was designated as a historic district on the National Register of Historic Places in 2009.[52]

Turkey Creek, however, has been subject to the increasing pressures of urban sprawl and the continued expansion of the City of Gulfport. The community's self-sufficiency insulated it for many decades from the persistent residential and commercial development that made the Mississippi Gulf Coast a widely known tourist attraction.[53] Yet, over time, Turkey Creek residents became aware of the disadvantages of being outside Gulfport's

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[49] *History of Turkey Creek, Mississippi*, TURKEY CREEK CMTY. INITIATIVE, http://turkey-creek.migcom.com/Content/10000/COMMUNITY_HISTORY.html (last visited Feb. 5, 2012) [hereinafter *History of Turkey Creek*].

[50] *Id.*

[51] *Ten Most Endangered List 2001*, MISS. HERITAGE TR., http://www.mississippiheritage.com/list01.html#8 (last visited Feb. 5, 2012) [hereinafter *Most Endangered List*].

[52] *Id.*

[53] *See History of Turkey Creek*, *supra* note 49.

protective reach, and the contaminated drinking water and persistent flooding conditions in the community prompted many residents to seek annexation.[54] After a local ordinance compelled the Turkey Creek community to tie into the Harrison County water supply in 1986, the community was overwhelmed by the promise of new developments which, rather than preserving their flood-prone homes and restoring the neighborhood to its previous vitality, only threatened the health and safety of their community as a whole.[55]

Commercial development projects, persistent deforestation, and a contaminated water supply have all jeopardized the continued survival of the Turkey Creek community, leading to its inclusion on the list of Mississippi's Ten Most Endangered Historic Places.[56] The most significant threat to the area, however, is the recurrent devastation of wetlands in the course of commercial and residential development.[57] Built over swampland, Turkey Creek has always been particularly susceptible to flooding.[58] The persistent destruction of wetlands threatens to worsen the flooding conditions in Turkey Creek, because the wetlands act as a filter for flood waters and slow its progress over the floodplain.[59] These recurring threats to the community inspired the creation of the Turkey Creek Community Initiatives (TCCI), a community organization founded "[t]o conserve, restore[,] and utilize the unique cultural, historical[] and environmental resources of the Turkey Creek community and watershed for education and other socially beneficial purposes."[60] Since its inception in 2003, TCCI has been instrumental in combating the threatened destruction of the historical neighborhood, and one of its major goals is to restore and preserve

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[54] Trisha Miller, *Crossing Muddy Waters: The Struggle to Preserve a Historic Neighborhood Along Mississippi's Gulf Coast*, NAT'L HOUS. INST., July/August 2005, *available at* http://www.nhi.org/online/issues/142/muddywaters.html.

[55] *See History of Turkey Creek*, *supra* note 49.

[56] *See Most Endangered List*, *supra* note 51.

[57] *See* Ray, *supra* note 1.

[58] *Id.*

[59] *Id.*; *see also* Jenny Coyle, *Showdown at Turkey Creek*, SIERRA CLUB: THE PLANET, July/August 2003, at 7, *available at* http://www.sierraclub.org/planet/200305/planet_July.pdf.

[60] *About TCCI*, TURKEY CREEK CMTY. INITIATIVES, http://turkey-creek.migcom.com/Content/10001/ABOUT_TCCI.html (last visited Feb. 5, 2012) [hereinafter *About TCCI*].

the community in such a way that environmental justice may be achieved for Turkey Creek residents.[61]

Though the neighborhood may be an official part of Gulfport, Turkey Creek and other parts of North Gulfport still do not have proper curbs or sidewalks, making for dangerous conditions during times of flood.[62] The creek itself, once a cultural center of the community known for its baptisms and fishing grounds, is now so polluted that the few surviving fish are inedible due to high levels of fecal coliforms from raw sewage leaking into the creek, toxic soil left over from an abandoned creosote plant, and excessive mercury present in the water.[63] After the City annexed Turkey Creek, Gulfport officials attempted, but failed, to rezone the neighborhood for commercial development.[64] One of the community's oldest cemeteries, established in the early twentieth century, was razed in order to accommodate a new residential apartment complex.[65] As of 2009, wetland areas of Turkey Creek and North Gulfport have been slated to be filled and turned into parking lots and car wash facilities for the nearby airport.[66] These illustrations are but a few which demonstrate the means by which the City of Gulfport has taken advantage of Turkey Creek's resources for its own benefit and shifted the costs to those struggling to revitalize the once-vibrant neighborhood, echoing Bullard's previously discussed definition of environmental racism.[67]

Additional examples of Turkey Creek's fight for justice have garnered national attention for the community threatened both by natural floods and Gulfport's continual quest for commercial development.[68] In 2001, the U.S. Army Corps of Engineers

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[61] *Id.*

[62] *See* Miller, *supra* note 54.

[63] *Id.*; *see also* Ray, *supra* note 1.

[64] Miller, *supra* note 54.

[65] *Id.*

[66] *See Most Endangered List*, *supra* note 51.

[67] *See* BULLARD, *supra* note 18.

[68] The situation in Turkey Creek has been featured, most notably, on CNN (Candy Crowley & Sasha Johnson, *Turkey Creek Feels Abandoned,* CNN (Sept. 22, 2005), http://articles.cnn.com/2005-09-22/us/turkey.creek_1_north-gulfport-bad-communication-mississippi?_s=PM:US) and *The Daily Show with Jon Stewart* (For a clip from the television program, see *Watch: The Daily Show Features Historic Turkey*

granted the City of Gulfport a permit under Section 404 of the Clean Water Act (CWA) to construct a storm water drainage system along Louisiana Avenue in the Turkey Creek neighborhood.[69] Under this permit, the Corps authorized the City to dredge a drainage channel along this street to collect stormwater runoff, and the City would deposit the excavated material at a designated upland site apart from the wetland surrounding the community.[70] During the course of the project, the City violated the CWA by placing excessive amounts of fill material at the project site and by depositing the excavated fill on nearby abandoned lots, which resulted in the unauthorized fill of almost one and a half acres of wetlands.[71] TCCI filed suit in 2007 to have the City remove the unauthorized fill from the wetlands, which, if allowed to remain, would exacerbate flooding conditions in the community, and the City negotiated a settlement to remediate the wetlands.[72]

In 2000, prior to the Louisiana Avenue situation, the Corps of Engineers also granted a permit to Butch Ward, a politically-well connected regional developer, to fill in 350 acres of wetlands in North Gulfport for a massive commercial-use complex and office park.[73] Outraged by the potential flood damage that such an expansive development could cause to the historic homes and churches of Turkey Creek, thousands of local residents filed petitions and submitted testimony to the City and the Corps voicing their indignation at the project.[74] Within forty-eight hours of learning of the proposed development, Rose Johnson, the chair of the Mississippi chapter of the Sierra Club, collected 526 signatures on a petition opposing the new construction, in addition to sixty letters addressed to the Corps of Engineers, which noted the "relatively high number" of comments they

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Creek, Mississippi, BRIDGE THE GULF (Jan. 25, 2011, 11:41 AM), http://bridgethegulfproject.org/node/235).

[69] Stephanie Showalter, *Turkey Creek Community Initiatives Continues Fight to Preserve Wetlands,* WATER LOG, Aug. 2008, at 10, *available at* http://masglp.olemiss.edu/Water%20Log%20PDF/28.2.pdf.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 11.

[73] Miller, *supra* note 54; *see also* Ray, *supra* note 1.

[74] Miller, *supra* note 54.

received from Turkey Creek residents.[75] The community's public opposition to the project led the then-mayor of Gulfport, Ken Combs, to reference Turkey Creek residents as "dumb bastards," highlighting the disconnect between the historically black community and those promoting Ward's development.[76] Securing representation by the Sierra Club, the Turkey Creek community threatened legal action over the issuance of the state and federal wetland fill permits, which, if granted, would be the largest permits granted for action on the Mississippi Coast since the passage of the Clean Water Act.[77] After months of public opposition, Ward withdrew his permit application to fill the wetlands, sparing the homes of Turkey Creek further damage from persistent flooding.[78]

Today, Turkey Creek continues to fight the Corps over wetland fill permits under the CWA. Most recently, the District Court for the Southern District of Mississippi ruled that TCCI lacked standing to challenge the Corps' Regional General Permit which would expedite the process for filling up to three acres of wetlands in order to spur commercial development projects in the wake of Hurricane Katrina.[79] As of the 2009 ruling, no one had filed an application under the RGP; therefore, TCCI could not assert that an actual increase in flooding in the community would occur.[80]

The recurrent initiatives to fill in these wetlands protecting the Turkey Creek neighborhood from pervasive and destructive flooding demonstrate that environmental injustice is at work in North Gulfport. As a historically black community, Turkey Creek's cultural value has been recognized by the National Register of Historic Places and the Mississippi Heritage Trust through its designation as a historical and endangered point of interest; however, real estate developers continually attempt to profit off of the area's wetlands by filling them and constructing office parks, disregarding the homes, churches, and schools that could be

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[75] *See also* Ray, *supra* note 1.

[76] *Id.*

[77] Miller, *supra* note 54.

[78] *Id.*

[79] Turkey Creek Cmty. Initiatives v. U.S. Army Corps of Eng'rs, No. 1:08cv124-LG-RHW, 2009 WL 2252882, at *1, *7 (S.D. Miss. July 28, 2009).

[80] *Id.* at *4.

destroyed by flooding in the aftermath. In this respect, this black community is shouldering an excessive environmental risk that has not been equally felt among other areas of Gulfport. Accordingly, Turkey Creek is one such community that "need[s] to be preserved and protected from pollutants and other harms" by environmental justice advocates.[81]

B. Eastmoor Estates—Moorhead, Mississippi

Two hundred fifty miles north of Gulfport, the town of Moorhead is located in Sunflower County, in the midst of the Mississippi Delta. According to the U.S. Census Bureau, 82.5% of Moorhead's population is African American, and approximately 48.4% of the community is below the poverty level.[82] Just outside of the city limits, the low-income subdivision of Eastmoor Estates provides standalone housing for eighty-four families.[83] Built in 1970, Eastmoor Estates was established outside of the Moorhead city limits in an effort to segregate the low-income, African American population from the remainder of the city.[84] Eastmoor Estates operated as a successful low-income housing project until 1993, when Glenn Miller acquired the subdivision and financed the purchase under the Low-Income Housing Tax Credit Program (LIHTC).[85]

After Miller took control of Eastmoor Estates, he failed to regularly maintain the common areas and individual homes as required by the LIHTC.[86] Residents noticed that the condition of

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[81] *See* COLE & FOSTER, *supra* note 3, at 16.

[82] *Profile of General Population and Housing Characteristics: 2010 Demographic Profile Data for Moorhead City, Mississippi*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1&prodType=table (last visited Feb. 5, 2012); *see also Selected Economic Characteristics: Moorhead City, Mississippi*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_DP03&prodType=table (last visited Feb. 5, 2012).

[83] Complaint to Enforce Low-Income Housing Tax Credit Obligations, for Intentional Tort, Negligence, Nuisance, to Enjoin Wrongful Eviction and Wrongful Foreclosure, for Damages for Unjust Enrichment, and for Other Relief at 2, Eastmoor Estates Residents Ass'n v. Miller, No. 4:10-cv-00144-WAP-DAS (N.D. Miss. Nov. 12, 2010) [hereinafter Complaint].

[84] Interview with Desiree Hensley, University of Mississippi School of Law, Civil Legal Clinic—Housing Division, in Oxford, Miss. (Dec. 1, 2010) (on file with author).

[85] Complaint, *supra* note 83, at 7.

[86] *Id.* at 9.

the homes deteriorated rapidly, with many tenants reporting leaking roofs, broken windows and doors, unstable foundations, electrical malfunctions, and faulty plumbing.[87] The state of the neighborhood itself similarly worsened, and many burnt-out and boarded-up homes line the sidewalks, which are broken and generally impassable.[88] The worst of the neighborhood's problems, however, surfaced in 1998, when Eastmoor's sewage system began to fail, causing raw sewage to back up into bathtubs, build up in yards, and accumulate in the streets where children play on a regular basis.[89] The failure of the system may have additionally contaminated the neighborhood's drinking water and, as such, the rampant sewage leaks present a considerable threat to the residents' health and well-being.[90]

By 2000, the situation in Eastmoor had attracted local attention and had been featured in area newspapers, and the efforts of the Eastmoor Estates Residents Association—the neighborhood's community organization—provided temporary solutions to the sewage situation; however, the City's occasional flushing of the sewer lines to reduce sewage backup never provided a permanent answer to the problem.[91] When it became apparent to the EERA that their actions had failed to convince either the City or Miller to repair the sewer system, the residents sought to file suit against Miller and contacted the Civil Legal Clinic of the University of Mississippi School of Law, which only represents clients whose income level falls at or below the federal poverty level.[92]

In October 2010, several Eastmoor tenants notified Miller of their intent to sue under the Clean Water Act for his failure to adequately maintain the sewer system.[93] Upon receiving this notice, he summarily began sending eviction notices to these

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[87] *Id.*

[88] *Id.* at 9-10.

[89] *Id.* at 2; *see also* Memorandum of Points and Authorities Supporting the Grant of a Preliminary Injunction at 2, Eastmoor Estates Residents Ass'n v. Miller, No. 4:10-cv-00144-WAP-DAS, (N.D. Miss. Nov. 12, 2010) [hereinafter Memorandum of Points and Authorities].

[90] Complaint, *supra* note 83, at 9.

[91] Interview with Desiree Hensley, *supra* note 84.

[92] Memorandum of Points and Authorities, *supra* note 89, at 17.

[93] Complaint, *supra* note 83, at 2.

residents, apparently in retaliation for the impending lawsuit.[94] In mid-November, the U.S. District Court for the Northern District of Mississippi entered a consent decree on the residents' motion to end the evictions prior to the resolution of the litigation of this matter.[95] Because of the nature of this housing development, the effect of the threatened evictions would have been extreme for this low-income community. The residents of Eastmoor have little money, and they range from young families with children to elderly or disabled adults whose sole source of income is a monthly social security check; the reality of eviction for these families is that many, if not all of them, would be unable to find alternative housing in Moorhead.[96] Moorhead and the surrounding areas have limited opportunities for low-income families, and, if all of the families involved in the litigation had been evicted, many would have faced certain homelessness.[97]

Eastmoor Estates was designed to be a neighborhood of rental homes, and this arrangement was preserved as part of Miller's purchase under the LIHTC.[98] As Miller allowed Eastmoor to fall into a state of disrepair, he began entering into Lease/Purchase agreements with many of the community's residents, in violation of the Land-Use Restriction Agreement (LURA) that he signed upon purchasing the subdivision.[99] The LURA requires Miller to maintain Eastmoor as low-income rental housing and prohibits the transfer of any part of the subdivision until 2038.[100] Under the guise of these Lease/Purchase

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[94] *Id.*; *see also* Memorandum of Points and Authorities, *supra* note 89, at 9.

[95] Interview with Desiree Hensley, *supra* note 84. As of February 2012, the City of Moorhead has received a Community Development Block Grant to replace the sewer system in Eastmoor Estates, which is contingent upon the city accepting ownership and control of the system in the future. In addition, the city has been conducting basic sewer maintenance at Eastmoor Estates since the district court entered an order providing that doing so would not prejudice the City's denial of liability in the case. Though the residents of Eastmoor may soon find relief from the neighborhood's pervasive sewage troubles, their case remains in active litigation over other conditions in the neighborhood. Interview with Desiree Hensley, University of Mississippi School of Law, Civil Legal Clinic—Housing Division, in Oxford, Miss. (Feb. 3, 2012) (on file with author).

[96] Memorandum of Points and Authorities, *supra* note 89, at 8-9.

[97] *Id.*

[98] Complaint, *supra* note 83, at 7, 11.

[99] *Id.* at 7-8.

[100] *Id.* at 7, 10.

agreements, many of the residents believed that they had an ownership interest in their homes.[101] The effect of allowing Eastmoor residents to "purchase" their homes effectively shifted all of the responsibilities of ownership to the residents—paying property taxes, purchasing hazard insurance for Miller, and repairing and maintaining the property—while allowing Miller to retain the benefits of owning the subdivision, including the right to evict the residents and keep the equity that they paid into the property.[102] Under these agreements, Miller attempted to thrust the duty of maintaining the condition of the home to the renter in possession of the property; however, the LURA and the requirements of the LIHTC program specifically require Miller, as the subdivision's legal owner, to maintain the properties in a habitable condition.[103] The fraudulent purchase agreements resulted in the residents paying mortgage interest, taxes, and homeowners' insurance, which violated the LIHTC's requirement that Eastmoor be operated as rent-restricted housing.[104]

With Miller and the Eastmoor residents at odds over which party is responsible for maintaining the properties, the persistent sewage backup in the neighborhood has gone virtually unrepaired since 1998. Residents have complained about the problem to the City of Moorhead, which furnishes Eastmoor with its water supply; however, city officials have contended that because Eastmoor is technically outside the city limits, the subdivision is not their responsibility to maintain.[105] As previously mentioned, the Eastmoor subdivision was deliberately constructed outside the Moorhead city limits in an effort to separate the low-income, predominantly African American community from the remainder of the city.[106] Thus, though the City of Moorhead furnishes Eastmoor's water, the City has refused to take responsibility for the deterioration of the sewage system. Additionally, since Miller refuses to maintain the system on the ground that he has "sold" the homes to the tenants, the residents of Eastmoor have been left

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[101] *Id.* at 8.

[102] *Id.* at 12; *see also* Memorandum of Points and Authorities, *supra* note 89, at 4.

[103] Complaint, *supra* note 83, at 12.

[104] *Id.* at 11.

[105] Interview with Desiree Hensley, *supra* note 84.

[106] *See id.*

with virtually no recourse other than litigation in order to achieve healthy living conditions and safe drinking water.

Like Turkey Creek, Eastmoor residents have faced the possibility of having their neighborhood—where they live, work, and play—destroyed, as those responsible for the destruction reap the benefits. If the flooding in Turkey Creek should worsen as land developers fill the surrounding wetlands to make room for expansive office complexes or residential apartment buildings, their homes, schools, and churches will be at risk. Similarly, if the sewage system in Eastmoor remains unchanged, residents face living amid pools of raw sewage, which poses a serious risk to their health. These communities have much in common—they are both predominantly black, they are both threatened by environmental hazards, and the residents are clearly fighting to have access to clean, healthy living conditions that are not at risk for destruction. The goals of these communities mirror those of the environmental justice movement, and residents of Turkey Creek and Eastmoor Estates have become grassroots activists for environmental justice, seeking a remedy for the inequities that their communities face.

IV. Remedying the Injustice

In order to remedy environmental injustice, state legislatures and local governments have the option of fighting the battle on the front end, before the environmental hazards have an adverse effect on the community, or, should legislative or municipal action not suffice to prevent these inequities, community members may resort to litigation in order to rectify the harm being done to the environment where they live, work, and play. Because of the difficulties that plaintiffs will face in highly politicized environmental justice litigation, communities are better served when states or municipalities implement measures to prevent or discourage environmental injustice; however, even if such measures are successfully implemented at the state or municipal levels, the fact remains that many low-income or minority communities will have to resort to litigation to remedy any environmental hazards that may still impact their residents. Should communities determine that litigation is the best remedy, there are measures that, if implemented by the community prior

to or during the lawsuit, can balance the political environment within the courtroom to better their chances of success.

A. Legislative Remedies

As environmental activists and legal scholars attracted increasing national attention to the mission to eliminate environmental injustice, legislation aimed at achieving this goal was frequently introduced to Congress during the 1990s; however, these legislative efforts for the most part failed at the federal level because the political composition of Congress was unreceptive to major environmental legislative changes.[107] Individual states, on the other hand, have been markedly more successful in implementing legislation and policies geared toward equitably distributing environmental harms and toxic conditions among all communities, regardless of their racial composition or socioeconomic status.[108] A growing trend in advancing environmental justice at the state level has been to increase avenues for meaningful community participation, which "leads to policy decisions that reflect the whole polity, and contribute to a more vibrant democracy including and beyond the environmental context."[109] Unless a state has specified additional requirements, the decision-making process typically involves the basic rules of notice and comment.[110] The development of state legislation designed to enhance public participation in this decision-making process demonstrates the growing recognition that individuals

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[107] *See* Rivers, *supra* note 7, at 462 ("[Federal l]egislation could improve the rigor of environmental justice enforcement tools, provide a private right of action, and lower the level of deference that courts afford to agency determinations that are perceived to be unjust. To date, however, the movement has been unsuccessful in efforts to shepherd environmental justice legislation through the Congress." (internal citations omitted)).

[108] AM. BAR ASS'N, ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY-STATE SURVEY OF LEGISLATION, POLICIES, AND CASES iv (4th ed. 2010) [hereinafter ENVIRONMENTAL JUSTICE FOR ALL], *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/environment_energy_resources/environmental_justice_for_all.authcheckdam.pdf.

[109] *Id.* at viii.

[110] COLE & FOSTER, *supra* note 3, at 107 ("[A]ll states require, at a minimum, that an applicant or agency provide notice to the public and that there be a reasonable period to receive written or oral comments . . . .").

actually affected by environmental decisions should be afforded an adequate opportunity to partake in this process.[111]

In keeping with this trend, Mississippi State Senator Deborah Dawkins proposed new environmental justice legislation to the Senate Committee on Environmental Protection, Conservation, and Water Resources in 2009.[112] If passed, Dawkins's bill would have increased the opportunities for the participation and meaningful involvement of residents of identified minority or low-income communities affected by permit applications, facility sitings, or enforcement of environmental laws.[113] Since Dawkins's proposed legislation died in committee, the state remains without any substantive environmental justice policy specifically mandating that the public be allowed to significantly participate in decisions that would affect the environmental status of the areas where they live, work, and play. Such legislation would assist local grassroots activists by affording them enhanced opportunities "to influence the outcome of the environmental decision and, ultimately, to shape the future of their communities."[114] However, with no specific policy in place at the state level, environmental justice activists in Mississippi must rely on their own efforts to organize and educate their peers to combat any environmental hazards or toxic conditions that negatively impact their communities.

Several states have enacted legislation which, if adopted in Mississippi, would bring the state closer to achieving the environmental justice movement's goal of providing communities bearing the burden of environmentally hazardous conditions with the opportunity to have a significant role in deciding to accept that burden. California, for instance, has instituted comprehensive community participation programs for permit approvals and various types of siting decisions.[115] Specifically, in requesting a permit for new landfill construction, developers must actively solicit the opinions of minority and low-income community

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[111] *See* ENVIRONMENTAL JUSTICE FOR ALL, *supra* note 108, at viii.

[112] S.B. 3086, 2009 Leg., Reg. Sess. (Miss. 2009), *available at* billstatus.ls.state.ms.us/documents/2009/pdf/SB/3000-3099/SB3086IN.pdf.

[113] *Id.* § 2.

[114] COLE & FOSTER, *supra* note 3, at 106.

[115] *See* ENVIRONMENTAL JUSTICE FOR ALL, *supra* note 108, at 27.

members as part of their proposal.[116] Moreover, developers seeking approval for hazardous waste facilities must publicize their proposals by clearly publishing notice in area newspapers, posting announcements throughout neighboring communities, and mailing information to adjacent landowners.[117] Though California's legislation specifically references the development of landfills and hazardous waste facilities, these laws could easily be expanded to cover additional permitting situations that could have adverse impacts on environmental justice communities.

Mississippi communities such as Turkey Creek could clearly benefit from legislation modeled after California's policy requiring developers to directly seek out the opinion of the low-income or minority communities surrounding their potential project sites. Even legislation mandating that developers publicize their proposals to adjacent communities can provide a clear benefit to environmental justice communities by putting residents on notice of the proposed development project, whether it be in the form of proposals for hazardous waste disposal facilities or for the filling of wetland areas, as with Turkey Creek. By the time Senator Dawkins informed Rose Johnson that a developer had requested a permit to fill hundreds of wetland acres adjacent to Turkey Creek, the public comment period had only one week remaining.[118] Though she collected dozens of letters and over 500 signatures on a petition opposing the commercial development project, had she and other members of the community realized that such a proposal was being considered by the Corps of Engineers, the community could have responded much more quickly and with much greater force. Had Senator Dawkins not informed Johnson of the proposed development in Turkey Creek, the community may have never realized that the only wetlands standing between their homes and seasonal flooding were poised for destruction. In circumstances such as these, legislation, such as that enacted in California, would prove instrumental in effectively encouraging public participation in environmental decision-making.

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[116] Assem. B. 1497, 2003 Gen. Assemb., Reg. Sess. (Cal. 2003), *available at* http://www.calepa.ca.gov/EnvJustice/Legislation.

[117] CAL. HEALTH & SAFETY CODE § 25199.7(a) (West 1990).

[118] Ray, *supra* note 1.

B. Community Education Programs

In addition to specific environmental justice measures enacted at the legislative level, several states have established community education programs, which, as part of a functional environmental justice policy, make significant strides in encouraging meaningful public involvement in environmental decision-making and the permitting process. West Virginia, for instance, has enacted a community education plan,[119] which, if adapted for Mississippi, could be instrumental in facilitating both public comprehension of the notice and comment process as well as agency awareness of community problems. The state has created the Office of the Environmental Advocate (OEA), an official responsible for assisting residents with navigating the complex processes of the state's Department of Environmental Protection.[120] The state's Environmental Advocate is additionally charged with disseminating information to residents of environmental justice communities regarding permitting, public notices, and the existence of environmental advocacy groups in various areas of the state.[121] Most notably, however, the EA has created two booklets designed to encourage community involvement in environmental decision-making.[122] The *Citizen's Guide* outlines DEP rulemaking procedures and describes the permitting process for projects requiring DEP approval.[123] The *Permit Hearings and Appeals Guide* provides residents with both a detailed overview of the public hearing and appeals procedures and instructions for participating in these DEP processes.[124]

The Mississippi Department of Environmental Quality has formed the Office of Community Engagement (OCE), which is, in

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[119] ENVIRONMENTAL JUSTICE FOR ALL, *supra* note 108, at 205.

[120] *Id.*; *see also* W. VA. DEP'T OF ENVTL. PROT: OFF. OF ENVTL. ADVOCATE, http://www.dep.wv.gov/environmental-advocate/Pages/default.aspx (last visited Feb. 5, 2012).

[121] ENVIRONMENTAL JUSTICE FOR ALL, *supra* note 108, at 205-06.

[122] *Id.* at 207.

[123] W. VA. DEP'T OF ENVTL. PROT.: OFF. OF ENVTL. ADVOCATE, CITIZEN'S GUIDE (2008), *available at* http://www.dep.wv.gov/environmental-advocate/Documents/DEP2008CitizensGuide.pdf.

[124] W. VA. DEP'T OF ENVTL. PROT.: OFF. OF ENVTL. ADVOCATE, PERMIT HEARINGS AND APPEALS GUIDE, *available at* http://www.dep.wv.gov/environmental-advocate/Documents/Permit%20Hearings%20and%20Appeals%20Guide.pdf.

many respects, similar to West Virginia's Office of the Environmental Advocate. Like West Virginia's OEA, Mississippi's OCE is dedicated to facilitating community involvement in the often complicated permitting and public comment processes.[125] The OCE has been charged with enhancing community organization by encouraging "equitable and authentic participation" and making the environmental decision-making process easier to understand and more accessible to the public.[126] In doing so, the OCE endeavors to promote community awareness of siting decisions and permit applications while also increasing public involvement in the decision-making process. Moreover, the OCE notes that one of its major goals is to present information in such a way that the public can better understand the environmental decisions at hand. Mississippi's OCE would likely be an ideal venue for providing publications along the lines of the Environmental Advocate's informational booklets regarding permitting and public hearings.

As an additional example, the California Environmental Protection Agency has instituted substantial opportunities for community involvement in environmental decision-making in the form of public and online discussion forums as well as a Listserv that emails subscribers with environmental justice announcements and opportunities for public comment.[127] The California EPA's decision to offer online forums and e-mail notifications could easily be adopted in Mississippi by the OCE, offering those with regular internet access the option to discover opportunities for public comment that affect their communities.

By acting as a liaison between state government officials and the public, these community education programs provide a direct means of achieving the environmental justice movement's goal of

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[125] MISS. DEP'T OF ENVTL. QUALITY: OFF. OF CMTY. ENGAGEMENT, http://www.deq.state.ms.us/mdeq.nsf/page/CE_Home?OpenDocument (last visited Feb. 5, 2012); *see also* MISS. DEP'T OF ENVTL. QUALITY: OFF. OF CMTY. ENGAGEMENT, PRESENTATION, *available at* http://www.deq.state.ms.us/mdeq.nsf/pdf/CE_Officeof CommunityEngagementPresentation/$File/Office%20of%20Community%20Engagemen t%20presentation.pdf?OpenElement (last visited Feb. 5, 2012).

[126] *Id.*

[127] ENVIRONMENTAL JUSTICE FOR ALL, *supra* note 108, at 29; *see also Public Participation in Cal/EPA's Environmental Justice Program*, CAL. ENVTL. PROT. AGENCY, http://www.calepa.ca.gov/EnvJustice/Participation (last visited Feb. 5, 2012).

allowing communities slated to bear the burden of hazardous or toxic conditions to speak out against decisions adversely affecting them.[128] Cole and Foster note that the typical pluralistic model of environmental decision-making tends to exclude those with certain social disadvantages, particularly those from low-income or minority communities, because they have fewer resources than others (industry figures and government officials) who partake in the decision-making process.[129] Specifically, many of these communities lack access to pertinent information or specialized knowledge necessary to fully participate in environmental decision-making that stands to have a negative impact on the places where they live, work, or play.[130] This lack of knowledge is an obstacle standing in the way of the adequate, meaningful, and significant community participation that is crucial for grassroots environmental justice advocates desiring to combat the decisions that spread an unequal environmental burden to disadvantaged communities.

Community education initiatives, such as those in place in West Virginia, California, and Mississippi, work to dismantle this obstacle by providing resources to the general public regarding decision-making procedures and the legal and scientific concepts pertinent to the community. According to Cole and Foster, "only when access to [information and knowledge] is relatively equal among parties to a conflict can the parties truly understand their own interests and dialogue proceed toward the democratic ideal."[131] Thus, these efforts to educate the public work to place low-income and minority communities on the same playing field as government and industry officials who have ample time to pursue the permitting process as well as adequate access to the technical knowledge and scientific resources necessary to support their position.[132]

Moreover, in West Virginia and California, officials undertake the additional responsibility of providing

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[128] *See* COLE & FOSTER, *supra* note 3, at 106.

[129] *Id.* at 109.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 110 (describing the developer's ability to dominate the decision-making process "by virtue of their superior economic power, knowledge, and opportunity to influence the process").

supplementary forms of notice to those likely to be interested in the public comment meetings for environmental decisions.[133] In many communities, standard notice and comment requirements are insufficient to provide an adequate announcement that proposed development is underway,[134] which is precisely what happened in Turkey Creek. In today's constantly connected society where many would prefer to check the news online than read the local newspaper, technology-dependent community notification initiatives, including online forums and e-mail messages, provide an additional means of notifying community members about decisions that could have a potentially adverse effect on their environment. For those with even occasional access to a computer, these measures can prove essential to providing adequate notice to communities, because the likelihood of residents reading the minuscule print of the official notice in an area newspaper is growing increasingly unlikely.[135] Accordingly, the implementation of comprehensive community involvement initiatives is essential to expanding the knowledge and resources available to low-income and minority populations, which in turn increases the chance that the public will have the opportunity to meaningfully participate in decisions that could potentially have devastating impacts on their communities.

C. The Viability of Litigation

1. The Pitfalls of the Courtroom

As the inadequacies of public participation measures surface during the decision-making process,[136] many communities understandably consider the feasibility of litigation as means of sparing themselves and their neighbors from increased environmental burdens. However, the decision to move the battle out of the community and into the courtroom can, in many instances, limit a community's chances of gaining the relief that it seeks.[137] Practically speaking, environmental justice disputes are

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[133] *See supra* notes 115, 117, and 121.

[134] *See* COLE & FOSTER, *supra* note 3, at 107-10.

[135] *Id.* at 110.

[136] *See id.* at 107-10.

[137] *Id.* at 121-30.

more political and economic than legal in nature; thus, an expensive, time-consuming, and resource-demanding lawsuit may prove ineffective or even harmful to the community's mission for justice—unless the plaintiff community members can act as a politicized and organized partnership focused on eliminating the environmental injustice affecting their surroundings.[138]

Should a community group decide to file suit against the developers or polluters causing environmental devastation to the places where they live, work, or play, they may choose between several avenues of litigation, generally environmental laws or civil rights; however, there are obstacles associated with each of these options that may prove difficult for environmental justice plaintiffs to overcome.[139] Regardless of the road chosen by plaintiffs and the strength of their case for environmental justice, the difficulties of litigation often can only be overcome by the community's political strength and dedication to their cause.[140]

a. Environmental Law Claims

A community may choose to base their lawsuit on purely environmental law claims, which, with their primary focus on procedural processes, generally carry a moderately high rate of success.[141] Many federal environmental laws (and their counterparts at the state level) are procedurally oriented, meaning that they outline a particular series of steps that, once they have been completed, signal effective compliance with the statute.

The National Environmental Protection Act (NEPA), for instance, is one such federal statute that concerns itself with only procedural hoops to be jumped through—once a permit applicant undertaking a federal action demonstrates that he has sufficiently documented the potential environmental effects of his proposal in an Environmental Impact Statement, then the applicant can

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[138] *See* Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 523-45 (1994); *See also* COLE & FOSTER, *supra* note 3, at 122, 129.

[139] *See* COLE & FOSTER, *supra* note 3, at 122-28.

[140] *See* Cole, *supra* note 138, at 523-45; *See also* COLE & FOSTER, *supra* note 3, at 122, 129.

[141] *See* Cole, *supra* note 138, at 523-45; *See also* COLE & FOSTER, *supra* note 3, at 122, 129.

theoretically check the EIS requirement off of his to-do list, receive his permit, and begin construction on his proposed development.[142] NEPA is not remotely concerned with the substantive environmental results of the proposed action; as long as the applicant has considered environmental effects as part of his EIS and permit application, the requirements of NEPA have been met.[143] Community groups may challenge such procedurally-oriented laws by alleging that the statutorily specified procedures were not actually followed.[144] Failure to adhere to the procedural measures outlined in the statute results in noncompliance, which can lead to the permit's revocation and, more importantly, success for those seeking to put an end to the proposal.

Typically, unless the plaintiff community is arguing that environmental injustice has occurred due to the failure of the defendant to follow statutorily specified procedures, lawsuits with a sole basis in environmental law will fail. Though courts have, in hearing complaints rooted in environmental laws, recognized that marginalized communities require adequate and equal access to the decision-making process, many courts refuse to extend these rulings to guarantee that these communities have a meaningful involvement in the process.[145] Moreover, another problem inherent in using purely environmental law claims as a means of remedying instances of environmental injustice is that the statutory scheme for many of these federal laws can, for an attorney who does not typically venture into the environmental field, prove quite technical and complex. For lawsuits of this type, engaging the services of a legal team well versed in the field of environmental law is essential.[146]

b. Civil Rights Claims

Community groups have the additional option of bringing a lawsuit in federal court under non-environmental statutes,

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[142] 42 U.S.C. §§ 4321-4370 (2006).

[143] *Id.*

[144] *See* COLE & FOSTER, *supra* note 3, at 122.

[145] *See id.* at 124.

[146] *See* Cole, *supra* note 138, at 528.

particularly using civil rights legislation.[147] Lawsuits raising civil rights claims to remedy environmental hazards, though largely ineffective from a legal standpoint, do have many benefits for the community groups that bring such claims. When environmental inequities are the crux of the lawsuit, the allegation of civil rights violations can prove particularly helpful to the plaintiff community by more clearly illustrating the nature of the community's struggles and building morale within the community as it prepares for the time-consuming and costly litigation that awaits them.[148] Moreover, claims brought under the Civil Rights Act have the additional benefit of not only pressuring the defendants to refute the allegations but also bringing more widespread attention to the community's environmental battles.[149]

Despite these benefits, however, from a legal viewpoint, claims under the Civil Rights Act prove difficult for environmental justice plaintiffs. Section 601 of Title VI of the Civil Rights Act of 1964 prohibits discrimination on the grounds of race, color, and national origin by any program that receives federal funding.[150] In an action under Section 601, however, plaintiffs must be able to establish discriminatory intent on the part of the permit applicant or agency granting the permit, which is often difficult or impossible to prove.[151] Accordingly, for most environmental justice plaintiffs, Section 601 lawsuits have been largely ineffective as a

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147 *See* COLE & FOSTER, *supra* note 3, at 125-28 (describing the use of civil rights laws as a tool for securing environmental justice through the decision-making process); *see also* Gauna, *supra* note 4, at 12 (noting that plaintiffs often "litigate under civil rights laws to address disparity in environmental protection"); Cole, *supra* note 138, at 530 ("Adding civil rights claims as part of an environmental law suit allows a community group to paint a fuller picture for the judge about what is actually going on in a community. It also has significant political import . . . ." (internal citations omitted)).

148 *See* COLE & FOSTER, *supra* note 3, at 126 ("Alleging civil rights claims, especially as part of a lawsuit that also uses environmental laws, can be very useful in building morale, raising the profile of a community's struggles, and educating the public about environmental racism."); *see also supra* note 147 and accompanying text.

149 *See supra* note 132 and accompanying text.

150 42 U.S.C. § 2000d (2006).

151 Guardians Ass'n v. Serv. Comm'n, 463 U.S. 582 (1983); *see also* COLE & FOSTER, *supra* note 3, at 126 ("[C]ourts have ruled that a government action that might have a discriminatory impact is not unconstitutional unless the decision maker had a discriminatory *intent*, something that is very hard to prove." (emphasis in original)).

means of preventing future or remedying existing environmental harms.[152]

When discriminatory intent presents a barrier to a civil rights claim, environmental justice plaintiffs have attempted to push private lawsuits through the federal court system under Section 602 of Title VI, which authorizes federal agencies to implement regulations prohibiting recipients from using federal funding in ways that cause disparate impacts.[153] This section of Title VI can even be applied in lawsuits filed against state and local agencies, on the grounds that many states receive federal funding for various purposes;[154] thus, the potential scope of defendants reached by Section 602 could be quite expansive.[155] Section 602 dispenses with the discriminatory intent requirement and, in theory, would appear to open the gates for environmental justice litigants to bring civil rights claims. However, though Section 601 creates a private right of action that permits plaintiffs to file suit in federal court,[156] the Supreme Court, in *Alexander v. Sandoval*, denied a private right of action to enforce agency regulations implementing Section 602.[157] Thus, following the *Sandoval* decision, environmental justice communities seeking to file suit under the Civil Rights Act must establish that a defendant engaged in intentional discrimination in making decisions that negatively affected the plaintiffs and their surrounding environment. To date, no plaintiff in a Title VI lawsuit has met this burden in the environmental justice context, though many communities have attempted to do so in several jurisdictions.[158]

Dissenting in *Sandoval*, Justice Stevens raised the possibility that plaintiffs could avoid Section 602's lack of a private right of action by instead filing their Title VI lawsuits under 42 U.S.C. §

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[152] COLE & FOSTER, *supra* note 3, at 126.

[153] Bradford C. Mank, *Title VI*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 23-24 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008).

[154] *Id.* at 23.

[155] COLE & FOSTER, *supra* note 3, at 127.

[156] *See, e.g.*, *Guardians Ass'n*, 463 U.S. at 594.

[157] Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding that specific agency regulations cannot provide more expansive rights to plaintiffs than the statute's prohibition against intentional discriminatory acts in Section 601).

[158] COLE & FOSTER, *supra* note 3, at 126.

1983, which creates liability for persons "who, under color of [state law] . . . [subject or deprive any citizen of the United States] of any rights, privileges, or immunities secured by the Constitution and laws [of the United States]."[159] In certain circuits, lower courts adopted Justice Stevens's approach and allowed plaintiffs to base a Section 1983 lawsuit on Title VI regulations; however, in the year following the *Sandoval* decision, the Supreme Court addressed the issue in *Gonzaga University v. Doe*, holding that Section 1983 cannot be used to enforce an individual's statutory rights if the underlying statute does not create a private right of action.[160] Thus, though *Gonzaga* provided environmental justice plaintiffs with the brief hope that they could avoid proving discriminatory intent under Section 601, the general rule has emerged that, in order to bring a claim under the Civil Rights Act to remedy environmental inequities, plaintiffs bear the burden of establishing discriminatory intent. As such, though the Civil Rights Act could be vital in lawsuits where such discriminatory intent is evident, these claims are, for the most part, ineffective.

2. The Politics of the Courtroom: Litigation Underscored by Community Action

As demonstrated by the situations in Turkey Creek and Eastmoor, the grassroots quest for environmental justice often features minority and low-income communities battling prosperous or politically well-connected developers. Though litigation can provide these communities with a concrete "winner" and "loser," the underlying participation of community members in fighting decisions that stand to contaminate or destroy the places where they live, work, and play is central to the community's ultimate success.[161] As local communities form grassroots organizations to combat decisions exposing them to environmental hazards, Cole and Foster note that "the potential exists to redefine existing power relations, to unsettle cultural

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[159] 42 U.S.C. § 1983 (2006).

[160] Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002).

[161] *See* COLE & FOSTER, *supra* note 3, at 105 ("[G]rassroots organizations created in the midst of struggles for environmental justice are crucial in creating an ongoing role for community participation in all decisions that fundamentally affect the participants' lives.").

assumptions about race and class, and to create new political possibilities for historically marginalized communities in local decision-making processes."[162] If litigation appears the only way to remedy a community's struggle with environmental inequities and hazardous conditions, the lawsuit must be underscored by the community's dedication to bringing their battle to an end; otherwise, the more politically connected and resource driven defendants will easily be able to dominate the courtroom.[163]

The battles that environmental justice communities have waged throughout the country have been and are currently being fought against developers and other individuals who likely have clear access to the best attorneys and expert witnesses that money can buy.[164] In order to compete with the resources available to the opposition, environmental justice plaintiffs must also hire attorneys and pay experts, which, for many low-income community groups, may prove to be no easy feat.[165] By hiring these attorneys and experts, community members are effectively taking their individual voices and placing their fate into the hands of an outsider, which could prove fatal to their cause.[166] The politics of the courtroom are weighted so heavily in favor of developers and industry insiders in environmental justice cases that, in many cases, lawsuits are lost the moment that the decision is made to go forward with the litigation process. The only way to tip the balance back in favor of the community is for the plaintiffs to act as a well-organized, united coalition focused on eliminating the environmental hazards impacting their surroundings.[167] In doing so, the community can redefine the politics of the courtroom, balancing the economic and legal resources of the well-connected defendants against the political unity and collective voice of the community plaintiffs.

When local residents actively participate in and publicly show opposition to decisions having devastating environmental impacts on their communities, any resultant litigation

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[162] *Id.*

[163] Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991, 1996 (1992).

[164] *See* COLE & FOSTER, *supra* note 3, at 129.

[165] *Id.*

[166] *Id.*

[167] *Id.* at 129-30.

immediately takes on more intimate undertones for the participants—the so-called "environment" that they struggle to save becomes more than simply their natural surroundings.[168] For the residents of Turkey Creek, the wetlands that they fought, and continue to fight to protect, act as a primary defense for their homes, schools, and churches from seasonal flooding.[169] For the tenants of Eastmoor, the struggle to compel Miller to repair their failed sewage system could lead to uncontaminated drinking water and a clean, healthy play area for their children.[170] By demonstrating a united front against the environmental inequities that their community has suffered, Turkey Creek homeowners gained enough political strength to force a well-connected developer to rescind his permit application to fill the neighborhood's essential wetlands without even resorting to litigation.[171] Eastmoor Estates, on the other hand, made the decision to file suit against Miller in November 2010.[172] As discussed above, their primary goal should not be solely limited to winning their lawsuit, because only focusing on the legal arena of the litigation could prove detrimental to their overall success.[173] Litigation may easily prove instrumental in their fight to live in a neighborhood that does not suffer from broken sidewalks and sewer pipes, with raw sewage steeping in their front yards; however, without the community's underlying political organization against Miller, Eastmoor Estates may not emerge victorious against those they allege have been perpetuating toxic and unhealthy conditions in the subdivision.[174]

a. Lessons to be Learned From Turkey Creek: The Battle for Environmental Justice in Eastmoor Estates

The situations in Turkey Creek and Eastmoor Estates typify the environmental justice movement's fundamental goal of

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[168] *See supra* notes 30-31 and accompanying text.

[169] Ray, *supra* note 1; *see also* Coyle, *supra* note 59, at 7.

[170] Complaint, *supra* note 83, at 9.

[171] Miller, *supra* note 54.

[172] Complaint, *supra* note 83, at 2.

[173] *See* Cole, *supra* note 138, at 523-45; *See also* COLE & FOSTER, *supra* note 3, at 122, 129.

[174] *See generally* Complaint, *supra* note 83.

providing clean, healthy, and safe living conditions for all, regardless of race or socioeconomic status. The achievement of this goal is clearly furthered "by the leadership of tenants' associations . . . with little prior involvement in environmental issues."[175] With the formation of TCCI, Turkey Creek became a more organized and informed community with regards to the environmental risks that could threaten the neighborhood and its surroundings,[176] and the community association for Eastmoor Estates, EERA, has provided the means by which interested residents could collaborate in their efforts to improve their community's unsanitary conditions.[177] After many years of experience fighting to protect the Turkey Creek neighborhood from flooding, leaders in the community have become well-versed in "political organizing and . . . working with racial discrimination and poverty."[178] Accordingly, these residents are becoming more experienced in fighting environmental injustice before they reach the stage where litigation is the only viable option as a remedy.

In many ways, the Turkey Creek community was, and continues to be, in an ideal position to combat instances of environmental injustice that may affect area residents. Originally settled by emancipated slaves soon after the end of the Civil War, Turkey Creek has a marked sense of pride in the rich history that the community has cultivated since its establishment.[179] Over time, the community created for itself a sense of cultural autonomy from the neighboring Gulfport-Biloxi metropolitan area, and the community's pride in its local customs and traditions has ultimately shaped local residents' desire to preserve the area's environmental and cultural heritage.[180] For this reason, Turkey Creek community members have been adamant in their resolve to ensure that the wetlands protecting their homes, churches, and schools remain intact and free from potentially destructive commercial developments.[181] After winning their first major battle to save their wetlands, Turkey Creek residents and TCCI have

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[175] NOVOTNY, *supra* note 2, at 2.
[176] *See* Ray, *supra* note 1.
[177] Complaint, *supra* note 83, at 3.
[178] NOVOTNY, *supra* note 2, at 2.
[179] *See History of Turkey Creek*, *supra* note 49.
[180] *See id.*
[181] *See* Ray, *supra* note 1.

remained active in community matters and responding to what they perceive to be additional threats to their community's environmental integrity.[182]

Along these lines, community activists in Turkey Creek have recognized the importance that community participation can have in building morale and raising awareness of potential environmental threats to their neighborhood. By increasing community awareness of both potential environmental hazards and the importance of attending public meetings, residents can identify environmental threats to Turkey Creek when they first arise. The widely-signed petition and numerous letters sent to the Corps after residents became aware of the proposed wetlands development were only the beginning of Turkey Creek's increased involvement in local government and decision-making processes.[183] Only a few Turkey Creek residents attended the initial public hearings regarding Ward's proposal; however, as community members became more aware of the importance of working together to combat environmental hazards, including the potential loss of their nearby wetlands, turnout at public hearings increased to between 200 and 300 residents.[184] The political and community organization of Turkey Creek is clearly rooted in the residents' sense of pride in, and concern for the welfare of, the land that their ancestors purchased, cultivated, and made their own, distinct from the urban metropolis growing nearby.[185]

Without this unity that has bound together Turkey Creek residents in their fight for environmental justice, the battles that they have waged against developers and politicians seeking to take advantage of the community's valuable resources could have been markedly less successful. Turkey Creek residents have proven that this type of community organization, dedication, and involvement is significant enough to change the politics of the courtroom.[186] Without an outspoken community devoted to preserving the environmental conditions of where they live, work, and play, the economic, political, and legal resources of the

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[182] *See About TCCI*, *supra* note 60.

[183] *See* Ray, *supra* note 1.

[184] *Id.*

[185] *See About TCCI*, *supra* note 60.

[186] *See* COLE & FOSTER, *supra* note 3, at 105.

opposition could have considerably overshadowed the community's situation. Outside of the courtroom, many communities, such as Turkey Creek, find their voices against such environmental injustice; accordingly, the only way to prevail in the realm dominated by legal experts and politicians is to bring those voices strongly into the courtroom.[187] In doing so, Turkey Creek residents were successful in their efforts to save their wetlands. Faced with a similar situation, residents of Eastmoor Estates will also have to bring their voices and community resources into the courtroom to have equal success.

Unlike Turkey Creek, Eastmoor Estates is a relatively new, 1970s-era subdivision that is intended to be exclusively for low-income renters.[188] Because Eastmoor Estates has only existed for the past forty years, the neighborhood has not had as much time to develop the sense of cultural identity that Turkey Creek has fostered over the past century and a half. Moreover, the nature of Eastmoor Estates in itself—a rental community—does not easily lend itself to the type of community concern, participation, and dedication to environmental preservation that is readily observable in Turkey Creek, which is comprised of many homeowners who have inherited their homes from past generations.[189] While many members of the Turkey Creek community are lifelong residents, the fact that Eastmoor was designed for renters indicates that, in essence, the neighborhood is constantly in flux and experiences high tenant turnover, particularly in light of Miller's persistent efforts to evict his tenants.[190] Central to this point is the fact that those who no longer live in the neighborhood will logically have no interest in participating in the community's environmental justice battles. Departing residents will have no interest in continuing to participate in community matters, and incoming residents will have to be educated about the environmental battles—that is to say, the sewer problem and resultant toxic conditions—that they will be facing as an Eastmoor tenant. Moreover, if the new tenants

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[187] *Id.* at 129-30.

[188] Complaint, *supra* note 83, at 7.

[189] Miller, *supra* note 54.

[190] Memorandum of Points and Authorities, *supra* note 89, at 9; Complaint, *supra* note 83, at 2, 7.

of Eastmoor only view their time in the neighborhood as temporary, the likelihood that they will become active participants in the community diminishes strongly.

However, many residents of Eastmoor have been paying what they believed to be mortgage payments and investing into their homes; because Miller did not have the authority to sell the homes to his tenants, the tenants do not have a legal interest in the home, though they may have an equitable one.[191] Regardless of the technical nature of the interest that these tenants may have in their homes, the belief that they are investing into their property could make them more vested in the outcome of the litigation against Miller, if they are in fact participants in the lawsuit. By investing in a home—or, at least, believing that they are investing in a home—the residents demonstrate that they do not necessarily view their time in Eastmoor as temporary. On the other end of the spectrum, many of the low-income renters who did not choose to invest in their property have limited options in their ability to move elsewhere, predominantly due to the lack of other low-income housing opportunities in the area.[192] Therefore, the entire community is comprised of those who consider their stay in Eastmoor temporary, those who believe that they have invested in their homes, and those who have few options besides remaining in the neighborhood. Of these groups, only one arguably has little interest in the outcome of the litigation, because they do not intend to remain in Eastmoor permanently. The remaining residents, however, must work to find their voice for the community and to bring that voice into the courtroom, as did many residents of Turkey Creek. Working toward this goal, Eastmoor residents established a community organization, EERA, which is central to encouraging tenants and residents to participate in community matters.[193] Forming the EERA was an important first step to organizing in the same political vein as Turkey Creek, and continuing this trend and encouraging community members to unite behind the litigation against Miller will prove essential as their battle continues.

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[191] Memorandum of Points and Authorities, *supra* note 89, at 11.

[192] *Id.* at 9.

[193] Complaint, *supra* note 83, at 3.

As illustrated by the situation in Turkey Creek, the more vested that residents are in the outcome of the environmental justice battle that they are fighting, the more likely they are to actively participate in both community matters and the litigation process, and this active participation is instrumental to their success.[194] Attending community meetings, publicly showing opposition to their environmental troubles, and raising community awareness about the ramifications of their sewage failure are all fundamental to shifting the political balance of the courtroom to Eastmoor's favor, and Eastmoor residents can use Turkey Creek as a clear example of how important community participation is for success in litigation.

CONCLUSION

Since the inception of the environmental justice movement in the 1980s, advocates have been working toward providing healthy and safe living conditions for all, regardless of their racial background or socioeconomic status. Many of the most effective advocates have emerged from the frontlines of the battle for environmental justice, fighting to free their own communities from environmental hazards and toxic conditions that threaten the places where they live, work, and play. Despite the valiant efforts of these grassroots activists, instances of environmental injustice will continue to occur in the absence of more concrete preventative steps at the legislative level. Fortunately for communities negatively impacted by pervasive environmental risks, there are means by which these hazardous conditions may be remedied, either before or after the environmental harm arises.

Virtually all communities facing environmental justice issues would prefer to have remedied environmental harms prior to their actual occurrence, and the most effective means to achieve this goal is to increase the community's participation in the environmental decision-making process and to promote awareness within the community about the potential of certain decisions to cause environmental harms. In Turkey Creek, for instance, the fact that community members have prioritized educating

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[194] *See supra* notes 30, 31, 161 and accompanying text; *see also* COLE & FOSTER, *supra* note 3, at 129-30.

themselves on the decision-making process and on the types of decisions that could negatively impact their surroundings has proven vital to their ability to recognize decisions that could pose environmental risks to their community. By recognizing the devastating impact that a proposal to fill neighboring wetlands could have on the community, Turkey Creek residents, from an early stage, attempted to fight the Corps' issuance of a Regional General Permit, intended to expedite the permitting process for wetlands-filling projects and spur commercial development after Hurricane Katrina. When communities take the initiative to understand the decision-making process and to organize themselves politically, they have achieved the important first step in combating instances of environmental injustice, both in and out of the courtroom.

Litigation can be an effective recourse, but not in the absence of dedicated community participation. For communities currently in the throes of litigation, it would be wise to remember that the most effective litigation strategy will combine legal arguments and community action. In the event that efforts outside of the courtroom fail to adequately remedy situations of environmental injustice, communities that have taken efforts to politically organize themselves are at a clear advantage over less organized and informed plaintiffs' groups. Primarily, these unified advocacy groups are able to bring their communities' political strength into the courtroom in an effort to offset the typically unbalanced dynamic between environmental justice plaintiffs and well-connected and wealthy developers and industry-insiders. For some environmental justice plaintiffs, the uphill battle against resource-driven defendants may seem insurmountable, particularly considering the high-costs of litigation. Though many low-income communities simply do not have the resources to engage in expensive and time-consuming litigation, their opponents generally have sufficient funding for experienced litigators, the industry's most respected expert witnesses, and, even worse, a prolonged legal battle that threatens to financially consume the resources of the plaintiffs seeking environmental justice. Just as these defendants use their resources and financing to their benefit, so too must these environmental justice plaintiffs bring to the table their biggest asset: their voices. On the streets of their

communities, it is their voices which attract attention, calling for justice and demanding to be heard. If they do not supplement their efforts in the courtroom with their own experiences and their own stories, then they may very well struggle for success.

*April Hendricks Killcreas**

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A CORPORATE CULTURE? THE ENVIRONMENTAL JUSTICE CHALLENGES OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

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INTRODUCTION

The jurisdictional status enjoyed by Alaska Natives in the last fifty years has differed from that of most Native American groups in this country. In lieu of a reservation system, with tribal sovereignty over each reservation, a 1971 federal act gave Alaska Natives forty-four million acres of land dispersed throughout the state, to be administered by a series of regional Native-run corporations. The Act creating this corporation-based system led to arguably a more equitable settlement with a Native population

than that enjoyed by any other American indigenous group. But it also enacted an imperfect solution to complicated problems surrounding a majority culture's interactions with indigenous persons. Several scholars have written on the particular issue of the inapplicability of a corporation model to Native society.[1] The outstanding question of tribal sovereignty, unaddressed by the Act but still a pressing matter, has also been considered.[2] However, no one has yet analyzed the Native corporations from an environmental justice perspective.

This paper proposes to do so. It begins with a general analysis of the opportunities for procedural injustice posed by making development decisions within a corporate model. It then uses a detailed examination of one development decision to illustrate how some of these concerns play out in practice, showing how a corporation-based model is vulnerable to charges of environmental injustice. It explains how the Alaska Native corporations ("ANCs") are particularly problematic, for their structure and their application to Native society. After limning the corporations' failures, however, it adopts a more expansive view, and considers the circumstances under which this corporate structure was adopted. It concludes that while the corporations themselves may be an imperfect solution, this is hardly the sole fault of the Natives, who may be doing as well as could be expected at ushering a traditional society into the modern era, under a business model all but forced upon them.

I. HISTORICAL BACKGROUND: ANCSA AND THE CREATION OF THE ALASKA NATIVE CORPORATIONS

The Native[3] corporations that are the subject of this paper were created by the Alaska Native Claims Settlement Act of 1971

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[1] *See, e.g.*, THOMAS R. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION 29–42 (1985); RAMONA ELLEN SKINNER, ALASKA NATIVE POLICY IN THE TWENTIETH CENTURY 117–22 (1997); James Allaway & Byron Mallott, *ANCSA Unrealized: Our Lives Are Not Measured in Dollars*, 25 J. LAND RESOURCES & ENVTL. L. 139, 140–42 (2005).

[2] *See, e.g.*, David S. Case, *Commentary on Sovereignty: The Other Alaska Native Claim*, 25 J. LAND RESOURCES & ENVTL. L. 149 (2005). On ANCSA and sovereignty generally, see *infra* Part III.

[3] This paper adopts the standard practice, in Alaska, of using *Alaska* as an adjective when referring to indigenous peoples as a whole, as in "Alaska Natives" or

(ANCSA).[4] The Act grew out of a specific set of historical circumstances, which had the peculiar effect of allying western oil companies and Native groups on the side of settling Native land claims. The Act that resulted has been both praised and criticized, and has been amended by every Congress since its adoption.[5] Among other things it has done, it has indisputably given Alaska Natives more control over land than most Native American groups in the Lower 48. It has also complicated the environmental justice analysis: because indigenous groups comprise both the decision-making bodies and the affected communities, analysis must be more nuanced than simply identifying the minority population, and asking whether it has been fairly treated.

ANCSA was enacted in the aftermath of oil finds on Alaska's North Slope in 1968, which lent new urgency to a then-nascent battle over Alaska Native land claims.[6] At the time, the legal status of Native claims to state land was uncertain. The Statehood Act of 1958 had "forever disclaim[ed] all right and title to any lands or other property" then held by Native groups.[7] At the same time, it authorized the State of Alaska to select slightly over 100 million acres from the "vacant, unappropriated, and unreserved" public lands of the United States.[8] In 1959, the court of claims held that Native groups possessed their traditional areas by right of aboriginal title, which had continued unabated since the Alaska Purchase of 1867.[9] The case appears to have laid the legal foundation for Native groups to assert aboriginal claims to state land.

"Alaska Native corporations." It refers to individual native groups by their chosen names, e.g., as Iñupiat or Tlingit. Anthropologists approve, suggesting that this terminology represents "the terms of self-designation acceptable to the indigenous peoples of Alaska." PATRICK J. DALEY & BEVERLY A. JAMES, CULTURAL POLITICS AND THE MASS MEDIA: ALASKA NATIVE VOICES 18 (2004).

[4] 43 U.S.C. §§ 1601–42 (2006).

[5] DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 155 & n.3 (2d ed. 2002).

[6] *See* ROBERT D. ARNOLD, ALASKA NATIVE LAND CLAIMS 131 (1976); James D. Linxwiler, *The Alaska Native Claims Settlement Act at 35: Delivering on the Promise*, 53 ROCKY MTN. MIN. L. INST. 1, 2, 11–12 (2007).

[7] Alaska Statehood Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339 (1958).

[8] *Id.* § 6(b).

[9] Tlingit & Haida Indians of Alaska v. United States, 177 F. Supp. 452, 460–69 (Ct. Cl. 1959).

The implications of this precedent were perhaps most fully appreciated by Iñupiaq Willie Hensley, then a twenty-five-year-old finance student at the University of Alaska, Fairbanks. While researching his final paper for a 1966 undergraduate course in constitutional law, he reasoned that, as the state had never won land from Natives in battle, nor signed any treaties with them, Alaska Natives across the state retained aboriginal title to their land.[10] Inspired by the conclusions of his paper, Hensley promptly assumed an activist role. At his instigation, Native associations soon formed, for the express purpose of filing land claims and preventing the state of Alaska from proceeding with its claims for the 100 million acres granted to it under Section 6(b) of the Statehood Act.[11] The Native groups had soon advanced aboriginal land claims to virtually all the state, including any areas the State of Alaska could have hoped to select for its Section 6(b) allotment.[12] Secretary of the Interior Stewart Udall was ultimately forced to impose a land freeze halting federal approval of any state land selections until Native claims were resolved, thereby preempting potential state oil and gas leases.[13] This was a subject of some interest for the State of Alaska, by this point an "economic basket case"[14] attempting to support a deficit government on fewer than a quarter-million people with scant private land to tax. There was, to put it mildly, a strong impetus to resolve Native land claims, so that oil development could go forward.

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[10] WILLIAM L. HENSLEY, FIFTY MILES FROM TOMORROW: A MEMOIR OF ALASKA AND THE REAL PEOPLE 110–13 (2009); *see also* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (establishing the doctrine of acquisition by discovery).

[11] HENSLEY, *supra* note 10, at 121–22.

[12] *Id.* at 136. Indeed, the total acreage potentially wrapped up in Native land claims exceeded the land area of the entire state. WALTER R. BORNEMAN, ALASKA: SAGA OF A BOLD LAND 467 (2003).

[13] Public Land Order 4582, 34 Fed. Reg. 1025 (Jan. 23, 1969). Wally Hickel soon succeeded Udall as Secretary of the Interior and modified the Order's terms, altering the land freeze to permit rights-of-way to be granted along the then-proposed route of the oil pipeline. *See* Public Land Order 4760, 35 Fed. Reg. 424 (Jan. 13, 1970); *see also* Peter Hoffman, *Evolving Judicial Standards Under the National Environmental Policy Act and the Challenge of the Alaska Pipeline*, 81 YALE L.J. 1592, 1609–10 & n.88 (1972) (discussing history and background of Udall's land freeze). Native groups promptly obtained an injunction against the pipeline. Hoffman, *supra*, at 1611.

[14] HENSLEY, *supra* note 10, at 136.

The Alaska Native Claims Settlement Act was the solution. It resolved aboriginal land claims by conveying to Native groups fee simple title to roughly forty-four million acres of state land.[15] Native ownership was administered through Alaska Native corporations, or ANCs, whose membership consisted of qualifying Alaska Natives. Anyone born on or before ANCSA's passage (December 18, 1971),[16] and of at least one-quarter Native blood,[17] received 100 shares of stock in a regional corporation generally corresponding to geographic divisions.[18] A total of twelve regional corporations were created, encompassing the entire state.[19] Within the area covered by each regional corporation,[20] a number of smaller village corporations were formed, corresponding to roughly 200 tribes within the state.[21] Each village was entitled to select an allocated amount of land from the nearby area.[22] The village corporations received surface title to these lands,[23] while

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[15] The State of Alaska has a total land area of about 365 million acres. CASE & VOLUCK, *supra* note 5, at 157.

[16] 43 U.S.C. § 1604(a) (2006).

[17] 43 U.S.C. § 1602(b) (2006).

[18] 43 U.S.C. § 1606(g)(1)(A) (2006). The regional corporation boundaries were generally drawn to keep together Native groups with a common cultural heritage, though BERGER, *supra* note 1, at 90–91, critiques these divisions. For a map of the regional corporation boundaries, see *Regional Corporations Established Pursuant to the Alaska Native Claims Settlement Act, December 18, 1971*, NAT'L PARK SERV., http://www.nps.gov/history/history/online_books/norris1/images/map4-1.jpg (last visited Jan. 13, 2012).

[19] 43 U.S.C. § 1606(a) (2006). A thirteenth regional corporation was later formed, to include Natives living outside the state; it was officially named the Thirteenth Regional Corporation. It did not receive a land settlement under ANCSA, but does share in the corporations' profit-sharing scheme. 43 U.S.C. §§ 1604(c), 1606(c) (2006).

[20] The largest regional corporation, Doyon, Ltd., draws members from a swath of interior Alaska nearly the size of Texas. Within this area, Doyon is entitled to roughly 12.5 million acres, making it the largest private landowner in the state. *Doyon Lands*, DOYON.COM, www.doyon.com/lands/lands_overview.aspx (last visited Jan. 13, 2012).

[21] 43 U.S.C. § 1607 (2006).

[22] The allotment amounts, which were based on village population, are set forth in 43 U.S.C. § 1613(a) (2006). The selected lands were to include the areas contiguous to each village, 43 U.S.C. § 1610(a)(1) (2006), plus additional selections, as necessary to fill out each village's allotment. 43 U.S.C. § 1611(a) (2006). For a map of the land held by the Northwest Arctic Native Association (NANA), highlighting the patchwork nature of land ownership that characterizes ANC holdings, see *NANA Regional Corporation Land Status*, NANA LANDS, http://www.nanalands.com/plotfiles/regional/regional.pdf (last visited Jan. 13, 2012).

[23] 43 U.S.C. § 1613(a)–(b) (2006).

the regional corporations received title to the subsurface estate.[24] Land within the North Slope's newly established National Petroleum Reserve was off-limits for Native selections[25]—a driving force for ANCSA had been the state's desire to lease this land to private oil companies. The land distribution was accompanied by the Alaska Native Fund, a monetary settlement of, eventually, $962.5 million, to be paid out to the regional corporations on a per capita basis.[26]

The ANCs have not enjoyed unmitigated economic success. Indeed, their financial performance in their first twenty years of existence was surprisingly poor, as the corporations made ill-advised business decisions, and some Native leaders struggled in their new roles as corporate executives.[27] After this rocky beginning, however, the corporations have been more successful. In 2004, the ANCs had total combined revenues of $4.47 billion and distributed $117.5 million in shareholder dividends.[28] Annual per capita payments to shareholders have ranged from nothing to as much as $25,000, with the latter attributable to one-time payouts from the sale of timber or financial losses for tax shelter purposes.[29] From 1973 through 1998, payments to shareholders of Arctic Slope Regional Corporation averaged around $600 per year, in 1998 dollars.[30] Today, ANCSA corporations account for seven of the ten most profitable Alaska-owned businesses.[31]

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[24] 43 U.S.C. § 1613(f) (2006).

[25] 43 U.S.C. §§ 1611(a)(1), 1613(f) (2006).

[26] Five hundred million dollars was to come from the State of Alaska, through revenue-sharing provisions for development on state and federal Alaska land, the remainder from the U.S. Treasury. 43 U.S.C. §§ 1605(a), 1608(g) (2006).

[27] Stephen Colt, *Alaska Natives and the "New Harpoon": Economic Performance of the ANCSA Regional Corporations*, 25 J. LAND RESOURCES & ENVTL. L. 155, 160–62 (2005).

[28] Linxwiler, *supra* note 6, at 4-5, n.11 (quoting a 2006 economic report, the most recent data available).

[29] Lori Thomson, *Dividends: Not Very Many Natives Are Lucky Enough to See the Big Payments*, JUNEAU EMPIRE (Jan. 25, 1999), http://juneauempire.com/stories/012599/Loc_dividend.html.

[30] *Id.*

[31] Linxwiler, *supra* note 6, at 4.

II. Analysis

A. Theory: An Imperfect Solution? Native Corporations and Procedural Justice

The Native corporations created by ANCSA are marked by fundamentally conflicting mandates: development and conservation. They are chartered as corporations and charged with creating shareholder dividends, a task that necessarily involves some level of development. At the same time, however, they presumably feel the need to serve as caretakers of the land, which is both the ancestral homeland for their people and the only real asset granted to the corporations. The conflict between conservation and development is hardly unique to Alaska, to Alaska Natives, or to Alaska Native corporations. With the ANCs specifically, however, an indigenous group is put in the more singular position of controlling both sides of this dynamic. There certainly is a conflict here, and it is not an easy one to resolve. But the ANCs, for better or worse, do have control over most aspects of this process.

Or at least the thirteen regional corporations do. The smaller villages within each region may have much less say in the actions of the regional corporation that includes them. When it comes to day-to-day activities, this is unobjectionable; it is presumably desirable for a corporation to operate with relative independence, and to not require shareholder approval for every small decision. Unfortunately, this lack of access may carry over to the regional corporation's large-scale development decisions. The potential result is village-level disenfranchisement over development decisions that affect them, a strong candidate for procedural injustice. This section highlights some aspects of the regional corporations' structure and organization that increase the potential for procedural injustice.

1. Board of Directors Composition and Village Access to Decision Making

The general concern here is that a regional corporation, which covers an area of tens of thousands of miles,[32] may be willing to subject a small corner of this area to undesirable development for the economic good of the corporation and region as a whole. The specific concern is that the composition of a corporation's board of directors will leave an individual village in the minority, creating the possibility of one village being outvoted by the rest of the board.[33] In the Arctic Slope Regional Corporation (ASRC), for example, the only corporation to make its bylaws readily available,[34] the fifteen-member board is composed of five directors from the town of Barrow, one each from seven villages, and three at-large positions.[35] At best, this means that a village will be in the minority should it wish to oppose a development decision favored by the board as a whole. At worst, there is the distinct possibility that Barrow will have eight (or more) votes and a majority of director seats, creating a strong "urban" bloc more willing to sign off on development in the villages.[36] This raises the specter of a village being outvoted by

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[32] NANA draws members from a region of 38,000 square miles, or roughly the size of Kentucky. *Introduction*, NANA LANDS, http://www.nanalands.com/introduction.htm (last visited Jan. 13, 2012). The largest ANC, Doyon, corresponds to a massive portion of interior Alaska, an area nearly the size of Texas. *See supra* note 20.

[33] The ANCs are overseen by boards of directors, each with one to two dozen board members. Several corporations delegate a specific number of director seats to individual villages within the larger region. For example, Doyon designates four out of twelve seats to particular villages, with the remainder filled on an at-large basis; NANA's twenty-three seats are divided between ten small villages (two each), the regional center of Kotzebue (one seat), and two at-large seats; Calista similarly designates seats by groups of villages, plus one for the regional hub of Bethel and one at large; and Ahtna designates all board seats to specific villages.

[34] Efforts to obtain these bylaws underscore the odd status of the Native corporations. They are not a federal government agency, and so would not come within the scope of a FOIA request. They fall outside the purview of the SEC, and so, unlike publicly-traded corporations, do not have to submit filings there. *See infra* note 49. The ANCs are, in fact, the beneficiaries of a remarkable lack of oversight for multimillion-dollar corporations.

[35] ARTIC SLOPE REG'L CORP., RESTATED BY-LAWS OF ARCTIC SLOPE REGIONAL CORPORATION art. II, § 1 (Dec. 2010) [hereinafter ASRC Bylaws], *available at* http://asrc.com/Documents/ASRC_ By_Laws_December_2010.pdf.

[36] Barrow is hardly an urban center in most senses of the term. It has a population of roughly 4500, polar bears prowl the outskirts of town, and the local NAPA auto parts

Barrow on a development decision, or by most of the Barrow directors and some other village representatives. The distances involved are substantial (from Kaktovik to Point Hope, all within the ASRC region, is roughly 500 miles); it is not hard to engage in nimbyism at such a remove.[37]

The discrepant composition of the regional corporations' boards of directors presents a textbook example of what Robert Kuehn analyzed as problems with procedural justice, roughly definable as the belief that all groups should have equal access to the decision-making process.[38] While Kuehn's analysis primarily addresses a Western model in which minority groups are excluded from a scientific body or mistreated by a government permitting agency,[39] his general principles are readily applicable here.[40] The development decisions of, say, ASRC do not exhibit "the right . . . to equal concern and respect in the political decision"[41] of how goods are distributed when they are made by a board of directors weighted heavily towards the interests of a single town – Barrow, in this example. Coupled with the board's corporate mandate to pursue development that will economically benefit the entire corporation, a village has a legitimate complaint on grounds of

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store sells harpoon equipment. CHARLES P. WOHLFORTH, THE WHALE AND THE SUPERCOMPUTER: ON THE NORTHERN FRONT OF CLIMATE CHANGE 10 (2004). However, Barrow's population easily exceeds that of the other seven ASRC villages combined, and it is the region's healthcare and judicial center. Under the bylaws, ASRC's principal office is located in Barrow. ASRC Bylaws, *supra* note 35, art. VI, § 1. It is certainly the area's regional center, if not a traditionally "urban" environment.

[37] The sheer distances involved when traveling within an area served by a regional corporation pose their own challenges, which create practical barriers to involving corporation members and to treating everyone fairly. When an annual meeting is held in Barrow, hundreds of roadless miles from one of seven widely dispersed villages, it is difficult for individual shareholders even to attend. The logistical problems are mitigated for a regional corporation centered on a true urban area with commercial air service, like Anchorage or Fairbanks, though even this is hardly ideal; airplane tickets from the Bush into Anchorage run to hundreds of dollars—a major challenge for a shareholder in a subsistence-based, cash-poor village economy.

[38] Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10,681, at 10,688 (2000).

[39] *Id.* at 10,688–93.

[40] Kuehn's analysis of Native American groups and procedural justice is, ironically, less directly applicable. *Id.* at 10,690–92. His examples focus on tribes advancing environmental justice claims on grounds of developers' insensitivity to tribal religious and cultural beliefs, which are not the concerns raised by ANC development decisions.

[41] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 273 (1977) (quoted in Kuehn, *supra* note 38, at 10,688).

procedural justice when a decision is made that adversely impacts its area specifically, and nowhere else within the larger region. The dynamic here is somewhat different than that envisioned by Kuehn or most environmental justice scholars; everyone involved is a member of an indigenous population, so it is unavailing to simply pick out the minority group, then ask if they have been excluded. At the same time, however, it is fair to look at the hardly homogenous population of Arctic Slope Iñupiat,[42] and to ask whether each community in this group has full access to decision-making and public participation procedures. When this analysis reveals that a smaller community may be easily outvoted by larger settlements on a development decision adversely affecting it, the affected community has hardly enjoyed "the right to participate as equal partners at every level of decision-making."[43]

2. Proxies and Afterborns

The corporation system is not without its procedural safeguards. While its appositeness to Native culture can justly be questioned, it should nonetheless provide displeased shareholders with the opportunity to influence overall corporate operations, by voting in new directors more sympathetic to their interests.[44]

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[42] *Cf.* Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1159–60 (1994) (emphasizing that indigenous groups, viewed by the majority culture as fairly unified, may in fact be composed of disparate subgroups, and marked by heterogeneity and factionalism).

[43] PRINCIPLES OF ENVIRONMENTAL JUSTICE PROCEEDINGS, THE FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT (Oct. 27, 1991), *reprinted in* ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 23 (Clifford Rechtschaffen & Eileen Gauna eds., 2003).

[44] This action, the sole potential recourse for disgruntled ANC members, should be contrasted with the options available to shareholders of any publicly-traded corporation: If they are unhappy with the company's decisions, they can simply sell their stock and reinvest the money elsewhere. *Cf.* ALBERT O. HIRSCHMANN, EXIT, VOICE, AND LOYALTY: RESPONSE TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 4 (1970). Under ANCSA, however, shares of ANC stock cannot be sold or transferred, except in limited circumstances such as bequeathal or court order in a child custody proceeding. 43 U.S.C. § 1606(h)(1)(B)-(C) (2006). For a displeased ANC shareholder, taking action at the board of directors level is the only option. *See also* Colt, *supra* note 27, at 167 (analyzing agency problems in Native corporations from an economic

While the inherent disproportionality of some corporation boards may always skew the numbers against a smaller village, that village should at least be able to vote in a different representative director, and potentially influence voting for any at-large positions.

In practice, however, things do not always work as smoothly in ANCs elections. The corporations' proxy system has been criticized for being confusing, advantageous to the incumbent Board, and antithetical to a traditional culture of consensus-based decision-making.[45] Discretionary voting has come in for particular criticism, as a way for the Board to manipulate shareholder votes by putting its influence behind a particular candidate.[46] Some corporations have endured protracted legal disputes over the fairness or accuracy of election materials with Cook Inlet Regional Corporation, for example, being marked by several years of election-related legal wrangling.[47] Many of these problems are traceable to the growing pains of imposing a resolutely corporate structure onto a culture that may not readily accept it.[48]

From the shareholders' perspective, state regulation is lax, and assistance negligible. The importance of state regulatory agencies is magnified here, as the ANCs fall outside the purview

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perspective, suggesting that they are "exacerbated by the fact that stock cannot be traded").

[45] Lori Thomson, *Voting Methods Preserve Corporations' Status Quo: These Institutions Face Their Own Battles*, JUNEAU EMPIRE (Jan. 1999), http://www.akhistorycourse.org/articles/article.php?artID=362.

[46] *Id.* ("That part of the system [discretionary voting] angers some shareholders because it gives the board an advantage in getting its people elected. For instance, the board may know one of its candidates is popular and will get enough direct votes to win a board seat. But another candidate may have less of a chance to win. So the board puts discretionary votes behind that person, improving the candidate's odds.").

[47] *See, e.g.*, Elizabeth Bluemink, *Battle Over CIRI Proxies Leads to a Countersuit: Board Members Say Information Misleads*, ANCHORAGE DAILY NEWS, June 29, 2008, at A3, *available at* 2008 WLNR 12362785; Paula Dobbyn, *Shareholders Dispute CIRI Vote: Independent Contender Jerry Ward Seeks Recount After Close Race*, ANCHORAGE DAILY NEWS, Aug. 18, 2005, at F1, *available at* 2005 WLNR 13069249.

[48] *See* BERGER, *supra* note 1, at 31 (discussing lawsuits over proxy technicalities that fomented bad blood within villages, discouraged people from serving on corporation boards, and tied up scarce resources); *cf.* Dobbyn, *supra* note 47 ("Complaints about elections at Native corporations . . . are not uncommon. The congressionally created companies are often run by board members with family ties, tribal connections and, sometimes, old axes to grind. The firms often operate more like families than mainstream businesses.").

of the federal Securities and Exchange Commission.[49] An audit requested by the Alaska legislature, however, critiqued the state's limited authority over the ANCs and lack of responsiveness to Native shareholders, leading to "anger and frustration among ANCSA shareholders who feel they have little power to challenge their corporations."[50] The audit concluded, "[T]he state does a poor job of guarding the interests of shareholders, and as a result, the intent of ANCSA is being undermined."[51] A corporate system that helps perpetuate the control of entrenched interests, amidst state oversight so weakened that shareholders wishing to be heard must "hire their own lawyers at their own expense,"[52] hardly provides an effective safeguard to the corporations' endemic problems with procedural injustice.

A final procedural quirk to the Native corporations' composition is that, under ANCSA, eligibility for tribal enrollment ended with qualifying Natives alive on the date of the Act's passage in December 1971.[53] Later revisions to the Act allowed ANCs to expand their membership to include these so-called afterborns,[54] if a majority of shareholders approve;[55] so far only four corporations have done so.[56] This bright-line division means

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[49] ANCSA exempted the Native corporations from mainstream federal securities laws, including the Securities Exchange Act of 1934. 43 U.S.C. § 1625(a) (2006). The Act as originally passed envisioned that the ANCs would have a twenty-year life span in their original form, and that ANC stock would become alienable on public markets in 1991, thus subjecting the companies to SEC oversight. 43 U.S.C. § 1620(d)(1) (2006). In the interim, Congress entrusted the State of Alaska to regulate the corporations. Dobbyn, *infra* note 50. Following the 1987 amendments, however, ANC stock remained inalienable. 43 U.S.C. § 1636(b)(1) (2006). The result is that ANCs remain outside the authority of the SEC, while seemingly enjoying a relaxed level of oversight from state regulators.

[50] Paula Dobbyn, *Audit Rips Native Corporation Oversight*, ANCHORAGE DAILY NEWS, Aug. 8, 1999, at C1, *available at* 1999 WLNR 7353575 (summarizing audit's findings).

[51] *Id.*

[52] *Id.*

[53] 43 U.S.C. § 1604(a) (2006). ANCSA does allow for shares to be transferred—albeit only to Natives or descendants of Natives—by court decree in divorce or child custody disputes, or to be inherited upon the death of the original shareholder. 43 U.S.C. § 1606(h)(1)(C), (h)(2) (2006).

[54] 43 U.S.C. § 1606(g)(1)(B)(i)(I) (2006).

[55] 43 U.S.C. § 1606(g)(1)(B)(iv) (2006).

[56] The four are ASRC, NANA, Doyon, and Sealaska. Sealaska's solution involved granting new shareholders voting rights, but no dividend rights. For more on Sealaska's resolution, see *infra* note 57.

that children born to the same family in the same place in 1970 and 1972, respectively, would be treated differently despite their presumably identical claims to "Native-ness." There are issues here of not only fairness but also culture; as one Sealaska Board member observed, excluding children conflicts with Tlingit law.[57] From a standpoint of procedural justice, finally, the afterborns issue means that many people who will be affected by a corporation's decisions simply have no say in the matter at all. Natives who are ANCs shareholders may be outnumbered, and may have difficulty voting in someone more responsive to their needs. But at least they have this option. These shareholders' younger neighbors, by contrast, while living in the same community, may have no such recourse available, even against development decisions that affect them equally. This disparate treatment of similarly situated minority groups would not pass muster under an equal protection analysis; it is similarly problematic from an environmental justice perspective. It seems a failure of procedural justice for an affected community member to be left without access to the relevant decision-making body in this manner.

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[57] *See* Cathy Brown, *The Next Generation: Corporations Must Decide Whether to Include Natives Born After 1971*, JUNEAU EMPIRE (Jan. 1999), http://www.akhistorycourse.org/articles/article.php?artID=364 (paraphrasing Rosita Worl). As Worl observes in Brown's article, the practice is at odds with traditional Tlingit custom: "In the past just by being born in a clan you have ownership rights in that clan." *Cf.* BERGER, *supra* note 1, at 12 (quoting a villager from Huslia: "Our own belief about land is as strong as urban people's law, but it's not recognized.") (internal quotation marks omitted). Worl is currently vice chair of the board of Sealaska Corporation, and has been a board member since 1987. *Rosita Worl, Juneau, AK (Board Vice Chair)*, SEALASKA, http://www.sealaska.com/page/rosita_worl.html (last visited Jan. 13, 2012). In 2007, she successfully advanced an afterborns resolution that a majority of Sealaska shareholders would support; that June, they passed a modified resolution affecting roughly 5500 descendants of original shareholders. *Sealaska Stockholders Agree that "After-Borns" Should Receive Shares*, ANCHORAGE DAILY NEWS, June 25, 2007, at B2, *available at* 2007 WLNR 12011015. Under the resolution, the newly franchised shareholders received voting rights in the corporation, but no monetary dividend. The fact that it took Worl years to accomplish this partial success, and two decades from the 1987 afterborns amendments to ANCSA, speaks to the difficulty in an individual's achieving her goals within a corporate setting, even when that individual is a member of the board.

3. Village Corporations vs. Regional Corporations

For the initial Native land allotments, ANCSA directed that the villages within each region select the land to be owned by the regional corporation.[58] The villages received title to the surface estate of their selections, while the regional corporations were granted title to the corresponding subsurface estate.[59] The precise definition of "subsurface" has been much litigated, with particular disputes arising over how to classify "common varieties of sand, gravel, stone, pumice, peat, clay, or cinders."[60]

The division of land into surface and subsurface estates, granted to village and regional corporations, respectively, is an unusual one. If nothing else, it violates the ancient maxim of *cuius est solum, eius est usque ad caelum et ad inferos*.[61] More pointedly, it raises the specter, for the villages, of development occurring uncomfortably close to home. When the villages set out to select land under their original ANCSA allotments, their incentive was to retain legal claim to their ancestral homeland. The years before ANCSA's passage were marked by poignant instances of Native families losing "title" to the land they had occupied for centuries;[62] an immediate effect of ANCSA was to end such displacements. And the Act itself specified that villages were to select land from areas contiguous to the village.[63] While this had an immediate reassuring effect for each village, the long-term result may simply have been to bring development closer to home. That the lands the

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[58] *See supra* note 22.

[59] *See supra* notes 23–24.

[60] CASE & VOLUCK, *supra* note 5, at 162. Courts have generally held for the regional corporations (that "resources on village lands could not be sold without the consent of the region"), though the villages have successfully obtained the right to limited use of "regional gravel." *Id.* at 164 & nn.53–56 (summarizing cases).

[61] "[F]or whoever owns the soil, it is theirs up to the sky and down to the depths . . . ." HOWARD R. WILLIAMS & CHARLES J. MEYERS, MANUAL OF OIL AND GAS TERMS 19 (7th ed. 1987).

[62] *See, e.g.*, HENSLEY, *supra* note 10, at 107–10 (describing aftermath of a 1965 BLM land auction of lots around Kotzebue, which effectively dispossessed the entire Iñupiaq community).

[63] 43 U.S.C. § 1610(a)(1) (2006); *cf. supra* note 22. For a demonstration of what this looks like in practice, see *KIC Land Status*, NANA LANDS, http://www.nanalands.com/plotfiles/Subregion/KICSelections.pdf (last visited Jan. 13, 2012) (showing that the holdings of Kikiktagruk Iñupiat Corporation, Kotzebue's village corporation, are centered around Kotzebue).

village corporations selected to preserve, at the surface, were the same lands deeded to the regional corporations, at the subsurface level, means that mineral development became more likely to occur near the individual villages. The weak status of each village within the regional corporation raises the possibility of villagers making land selections that ultimately bring development upon themselves, then being unable to stop it.[64] This is a rather perverse incarnation of distributive justice.[65]

B. Practice: Development Decisions in Action

Development decisions taken by the regional corporations demonstrate some of these concerns with procedural justice playing out in practice. This section analyzes one such decision, the development of Red Dog Mine, in some detail. It then cites a handful of other examples that could be explored in future work on this topic.

1. Mining: Red Dog Mine, NANA, and Kivalina

Red Dog Mine is located in northwest Alaska, within the holdings of NANA Regional Corporation. It is about ninety miles north of Kotzebue, and fifty-five miles inland from the Chukchi Sea.[66] The nearest coastal settlement, the village of Kivalina, is roughly fifty miles southwest of the mine, and sixteen miles up the coast from the mine's port on the Chukchi Sea.[67] Kivalina is one of ten villages in the NANA region.[68]

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[64] *Cf.* Leisnoi, Inc. v. Stratman, 154 F.3d 1062, 1066–68 (9th Cir. 1998) (suggesting that village corporation approval is required only for regional mining activity within the area directly occupied by the village itself, i.e., that a regional corporation would not need permission to mine inside the contiguous area selected under § 1610).

[65] *Cf.* Kuehn, *supra* note 38, at 10,683-88.

[66] *Red Dog by the Numbers*, NANA REG'L CORP., http://www.nana.com/regional/resources/red-dog-mine/faq/ (last visited Jan. 13, 2012).

[67] *Kivalina*, NANA REG'L CORP., http://www.nana.com/regional/about-us/overview-of-region/kivalina/ (last visited Jan. 13, 2012). The inland village of Noatak, also in the NANA region, is actually closer to the mine. However, its traditional subsistence activities have been relatively unaffected by Red Dog; Kivalina has had more disputes with NANA over the mine. This is presumably because Noatak, on the Noatak River, is in a separate watershed than Kivalina and the Wulik.

[68] *Overview of Region*, NANA REG'L CORP., http://www.nana.com/regional/about-us/overview-of-region (last visited Jan. 13, 2012).

The mine is the chief economic engine of NANA and has over 500 employees.[69] Roughly fifty-eight percent of them are NANA shareholders,[70] and approximately twelve of them are from Kivalina.[71] Red Dog is an open-pit mine that extracts zinc, lead, and silver; it is the largest mine in the state, and one of the largest zinc mines in the world.[72] Its operating profit in 2007 was $1.4 billion.[73] It is difficult to overstate the mine's centrality to NANA, or its economic importance to this otherwise impoverished region of northwest Alaska, "where jobs are scarce."[74]

Red Dog Mine has been an "environmental battleground" for decades.[75] Issues over the mine's safety arose even before its opening, in 1989, with the then-recent *Exxon Valdez* oil spill still very much on people's minds.[76] Alongside explicit environmental

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[69] *Red Dog Mine*, NANA REG'L. CORP. http://www.nana.com/regional/resources/red-dog-mine/ (last visited Jan. 13, 2012).

[70] *Id.*

[71] Elizabeth Bluemink, *Subsistence Effect? EPA Study Suggests Belief that Red Dog is Reducing Game Take May be Correct*, ANCHORAGE DAILY NEWS, Jan. 29, 2009, at A1, *available at* 2009 WLNR 1755719.

[72] NANA REG'L CORP., *supra* note 69; *see also Resources FAQ*, NANA REG'L CORP., http://www.nana.com/regional/resources/resources-faq/ (last visited Jan. 13, 2012).

[73] Bluemink, *supra* note 71 (summarizing from Teck Cominco's 2007 annual report). The mine is operated by Teck, a Vancouver, Canada-based mining company. In lawsuits against the mine, Teck Cominco Alaska, Inc., has been the named defendant, but NANA retains ownership of the mine, and has been an intervening defendant. *See, e.g.*, Adams v. Teck Cominco Alaska, Inc., No. 3:04-CV-00049-JWS, 2006 WL 2105501 (D. Alaska July 28, 2006).

[74] Elizabeth Bluemink, *Mine's Pollutants Stir Controversy: Nearby Villagers, Others Question Effects on Human Health*, ANCHORAGE DAILY NEWS, Jan. 21, 2008, at A1, *available at* 2008 WLNR 1212111.

[75] *Id.* ("Red Dog was an environmental battleground even before it opened in 1989.").

[76] *Id.* The mine's problems with contaminant runoff, the subject of litigation as recently as 2006, Adams v. Teck Cominco Alaska, Inc., 414 F. Supp. 2d 925 (D. Alaska 2006), were apparent before the mine even opened. David Hulen, *Zinc Levels in Creek Concern State Officials*, ANCHORAGE DAILY NEWS, Oct. 7, 1989, at B1, *available at* 1989 WLNR 2943868 ("State environmental authorities are worried about unusually high levels of zinc seeping into a creek near the soontoopen [sic] Red Dog Mine"). At the time, state environmental authorities believed that zinc runoff would be too diluted to pose a health risk by the time it reached Kivalina, fifty miles downstream. *Id.* Problems with runoff and water quality continued over much of the ensuing decade, leading to the formal litigation discussed below. *See* David Hulen, *Toxic Metals Foul Stream Near Mine*, ANCHORAGE DAILY NEWS, Aug. 18, 1990, at A1, *available at* 1990 WLNR 4066392; Kim Fararo, *Mine Spends $11 Million to Clean up Creek Flows*, ANCHORAGE DAILY NEWS, July 25, 1991, at C1, *available at* 1991 WLNR 4262447; Kim Fararo, *Mine Dumps Metal-Laden Water: Spill Not Expected to Threaten Fish,*

concerns were subtler issues connected with introducing a large-scale open pit mine to a sensitive area. For example, the mine could have impacts on wildlife that were harmful to local game or to Native subsistence users, while still falling below the threshold that federal environmental agencies would find explicitly harmful.

One account of how these concerns were balanced against the desire for economic development came from Willie Hensley, by this point a NANA board member:

> We [NANA leadership] also created an Elders Council, made up of some of our most prestigious village leaders, whose mission was to advise us on potentially contentious issues. When we decided to develop the Red Dog Mine about ninety miles north of Kotzebue . . . we had to face its inevitable impact on the migration of the caribou. With the help of the Elders Council, we consulted with our people and came to a consensus that the jobs the mine would create were well worth any effect it might have on our caribou hunting.[77]

A counter-argument comes from contemporary residents of Kivalina, "one of the most traditional villages in the NANA region."[78] They gave concerns over water pollution more weight in light of the value they placed on the Wulik River (the village lies at the Wulik's mouth), saying of the mine, "it won't work if it destroys our river. We live from the river."[79] They also neatly identified the conflicting mandates of conservation and development, while acknowledging the joint desirability of jobs and subsistence: "Sometimes I think we're kind of fighting ourselves . . . I know NANA's trying to look out for everyone's interests. They want jobs and they want subsistence. And maybe we can have them both. Sometimes I wonder about that."[80]

The villagers' doubts seem to have been well-founded: Red Dog's operation has been marked by persistent water quality

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Humans, ANCHORAGE DAILY NEWS, Apr. 22, 1992, at C1, *available at* 1992 WLNR 4549363; Bruce Melzer, *Dirty Mining to Cost Firm $4.7 Million*, ANCHORAGE DAILY NEWS, July 14, 1997, at A1, *available at* 1997 WLNR 6357249.

[77] HENSLEY, *supra* note 10, at 172–73.

[78] David Hulen, *Red Dog Mine Changes Lives in 11 Villages*, ANCHORAGE DAILY NEWS, Jan. 7, 1990, at A1, *available at* 1990 WLNR 4064401.

[79] *Id.* (quoting Joseph Swan, Sr., a whaling captain and mayor of Kivalina).

[80] *Id.* (quoting Kivalina resident David Swan, a former NANA board member).

violations, posing a threat to the Kivalina residents' well-being.[81] There has also been emerging concern over the health risks posed by dust-borne pollution from trucks on the haul road between the mine and the port,[82] and about the cumulative effect of mining operations on subsistence activities.[83] The result is that the residents of Kivalina, in area or population only a small portion of the overall NANA region, have been made to bear a disproportionate impact from a massive project that has economically benefited the entire regional corporation. Basic concerns for procedural justice make this scenario troubling.

Over the past decade, Kivalina's opposition to a proposed expansion of Red Dog's port, and a growing awareness of the health hazards posed by mining operations, crystallize the challenges facing the village as it seeks to resolve its perceived inequitable treatment by NANA. In April 2000, for example, Kivalina's tribal government took out a full-page ad in the region's weekly newspaper to express its opposition to the proposed expansion.[84] The ad charged that NANA was "ignoring village concerns."[85] The following year, the National Park Service released a study on mineral levels near the twenty-four miles of the haul road that pass through nearby Cape Krusenstern National Monument—federally controlled national park land.[86] The study found lead levels exceeding 400 parts per million (ppm), as well as high levels of zinc and cadmium both at the roadside and up to a mile away, the furthest extent of the testing.[87] State regulators declined tribal requests, through environmental law

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[81] Water-quality issues from the mine's founding through the 1990s are discussed *supra* note 76 and accompanying text. Issues relating to water-quality problems during the 2000s are discussed *infra*.

[82] *See* Bluemink, *supra* note 74.

[83] *See* Bluemink, *supra* note 71 ("A new federal study says that the state's largest mine likely caused reduced caribou and beluga harvests by nearby villagers.").

[84] Paula Dobbyn, *Kivalina's Council Fights Port Project*, ANCHORAGE DAILY NEWS, Apr. 26, 2000, at E1, *available at* 2000 WLNR 9000872 (describing Kivalina's ad in *The Arctic Sounder*).

[85] *Id.* ("'They haven't made any effort to have us sit down and discuss the matter,' said [tribal council president David] Swan.").

[86] Paula Dobbyn, *Mine Road to Stay Open: Official Says Health Risk Isn't Enough to Justify Closure*, ANCHORAGE DAILY NEWS, July 14, 2001, at D1, *available at* 2001 WLNR 11282716.

[87] *Id.* (explaining how mineral dust escapes from trucks into the nearby landscape).

firm Trustees for Alaska, to close the road, ruling that there was not a sufficient health hazard present to warrant a closure.[88] Crucial to this holding was the state Department of Environmental Conservation's decision to treat the haul road as an industrial area, as opposed to a residential area: The cleanup standard for industrial areas is a less stringent 1,000 ppm, as opposed to 400 ppm for residential areas.[89] Kivalina residents did not appreciate the distinction, countering that they did not view the National Monument land as an industrial area.[90] They expressed displeasure over the state's lack of responsiveness,[91] and were troubled that their "health concerns [were] being ignored."[92]

Kivalina's experience to this point reflects a pattern common to many environmental justice communities: a negatively affected minority group turns to the government for assistance, but is rebuffed, while charging that the state consistently supports industry and development, here through an industry-friendly interpretation of an environmental statute.[93] The next step in this process is equally familiar: enter Luke Cole.

In September 2002, the Center on Race, Poverty & the Environment, with Cole as lead attorney, filed suit against Teck Cominco, alleging hundreds of violations of the Clean Water Act.[94] One Kivalina resident explained that they took legal action because they could not receive industry or government attention in any other manner.[95] Kivalina gained several years' worth of

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[88] *Id.*

[89] *Id.*

[90] *Id.* ("Residents have historically hunted caribou and gathered berries and greens in the area.").

[91] *Id.* ("'They're the state of Alaska and we're a tribal government. We're 98 percent Native and they've always supported Red Dog. It angers me even if it doesn't surprise me,' said [administrator Colleen] Koenig.").

[92] *Id.*

[93] Compare Koenig's comments, *supra* note 91, or Swan's outlook in Dobbyn, *supra* note 84, "Swan predicts the feasibility study will basically rubber-stamp the project."

[94] Paula Dobbyn, *Kivalina Lawsuit Targets Red Dog: Village Group Claims Mine Is Fouling Primary Water, Food Source*, ANCHORAGE DAILY NEWS, Sept. 20, 2002, at D1, *available at* 2002 WLNR 13193202.

[95] Paula Dobbyn, *Kivalina Will Sue Teck Cominco: Villagers Say That Mine Discharges Are Affecting Their Water Supply*, ANCHORAGE DAILY NEWS, July 18, 2002, at E1, *available at* 2002 WLNR 13195331 ("The [Kivalina Relocation Planning] committee asked the California environmental justice center to assist them in suing

legal attention through its lawsuit; it was not until July 2006 that an Anchorage district court judge granted partial summary judgment in its favor.[96] Trial on the remaining claims was ultimately set for May 2008;[97] a settlement was reached shortly before trial.[98] Under the settlement, Cominco agreed to spend up to $120 million to build a wastewater pipeline from the mine directly to the Chukchi Sea, allowing wastewater to be discharged into the ocean and bypassing the Wulik River entirely.[99] It also agreed to purchase water filtering units for most of the buildings in Kivalina, and to help pay for their installation.[100]

While the lawsuit may have finally solved Red Dog's problems with water quality and harmful runoff, the mine's effects on local wildlife—including beluga whales near the port and caribou migrations along the haul road—remain in dispute. A 2005 environmental impact statement for a proposed improvement to the port facility led to a discussion over declining harvests by Kivalina whalers, and counter-accusations as to who was responsible for falling beluga numbers.[101] A 2009 draft EPA report took up similar issues and effectively agreed with the villagers, concluding that the mine "likely caused reduced caribou

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Teck Cominco. It did so after years of trying to get government officials and mining executives to listen, [Kivalina teacher and lead plaintiff Enoch] Adams said. 'We couldn't get anyone's ear.'").

[96] Adams v. Teck Cominco Alaska, Inc., No. 3:04-CV-00049-JWS, 2006 WL 2105501 (D. Alaska July 28, 2006) (granting plaintiffs' motion for summary judgment on 618 violations of a daily total dissolved solids limit; denying summary judgment on nearly 1400 other violations); *see also* Paula Dobbyn, *Red Dog Polluted: A Judge Has Upheld a Third of the Water-Quality Violations*, ANCHORAGE DAILY NEWS, Aug. 2, 2006, at F1, *available at* 2006 WLNR 13389882.

[97] Elizabeth Bluemink, *Court Date Set for Red Dog Pollution Lawsuit: Liability for Alleged Infractions at Issue*, ANCHORAGE DAILY NEWS, Mar. 22, 2008, at A6, *available at* 2008 WLNR 5684862.

[98] Tony Hopfinger & Joe Schneider, *Teck Cominco to Pay $120 Million for Alaska Pipeline*, MONTREAL GAZETTE, Sept. 5, 2008, at B5, *available at* 2008 WLNR 28470343.

[99] *Teck Cominco to Spend Up to $120 Million on Wastewater Line*, 29 No. 6 ANDREWS ENVTL. LITIG. REP. 6 (Oct. 15, 2008) (discussing Adams v. Teck Cominco Alaska, Inc., No. 04-00049, *consent decree filed* (D. Alaska Sept. 3, 2008)).

[100] *Id.*

[101] Tom Kizzia, *Beluga Migration Disputed: Villagers Say Whales Have Moved Due to Red Dog Zinc Shipments*, ANCHORAGE DAILY NEWS, Mar. 20, 2005, at B1, *available at* 2005 WLNR 4543680 (quoting the corporation's officials suggesting that "increased hunting pressure" from local whalers is to blame, Kivalina residents countering that "noise and activity" at the dock had driven the whales farther offshore).

and beluga harvests by nearby villagers."[102] The effects of pollution from the haul road on adjoining ecosystems, first tracked in a National Park Service study in 2001,[103] remain in question. A November 2007 report by Red Dog scientists found that dust pollution from the road was harming nearby plants,[104] while a USGS/NPS study from February 2009 found that the dust was not seriously harmful to small animals.[105] Though both studies found that the dust did not pose a threat to humans, local subsistence users drew their own conclusions. Enoch Adams, lead plaintiff in the 2002 suit against Cominco, explained that the Kivalina villagers "'don't pick berries around there. I don't hunt caribou there,' he said, referring to the land around the haul road and the port."[106]

Kivalina's experience reflects many attributes common to environmental justice communities. The Kivalina villagers were adversely impacted by a development decision they did not want and were to some extent excluded from the decision-making process. They sought resolution by a variety of means, ultimately achieving a partial success through the legal system, after concluding that neither industry nor government was taking them seriously. They have ongoing problems despite the legal settlement; beluga numbers in the Chukchi Sea remain diminished, and studies continue on the long-term effects of mineral dust dispersion from the haul road. And while a handful of villagers remain in town and commute to jobs at the mine,[107] more have moved hundreds of miles to Anchorage, and commute

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[102] Bluemink, *supra* note 71.

[103] *See* Dobbyn, *supra* note 86.

[104] *See* Bluemink, *supra* note 74.

[105] Elizabeth Bluemink, *Study Finds Little Harm in Red Dog Dust: Continued Monitoring is Recommended*, ANCHORAGE DAILY NEWS, Feb. 12, 2009, at A3, *available at* 2009 WLNR 2817511. The study found lead concentrations twenty times the norm in small birds and voles near the road, but concluded there was "no 'clear evidence' of serious biological effects." *Id.*

[106] Bluemink, *supra* note 74.

[107] Red Dog Mine, like North Slope oil drilling, operates on a two-on, two-off schedule; workers fly into a remote area, work long hours for two weeks straight, then fly home for two weeks off. The flight in and out is typically paid for by the employer.

to Red Dog from there.[108] This final development seems a tacit acknowledgement of the mine's potential to harm the area, and a decision to, like the rest of NANA Regional Corporation, benefit from the mine economically, without suffering its adverse effects on the local environment.

2. Coal Extraction, Timber Sales, and Inland and Offshore Oil Drilling: Possibilities for Future Study

NANA's development decisions for Red Dog Mine form an effective case study, as its interactions with Kivalina reflect environmental justice concerns that play out in development decisions around the country. Moreover, the mine's extended operation, documented health concerns, involvement of the federal government, and filing of a lawsuit all create a record, making this history relatively easy to reconstruct. Analogous development decisions by other Native corporations merit similar scrutiny, and would likely reflect similar issues to those raised by NANA's development of Red Dog. In this vein, further work in this area could consider some or all of:

- ASRC's ongoing efforts to identify coal reserves for future development, to the dismay of neighboring Point Lay and Point Hope residents concerned about the project's potential to harm the caribou central to their subsistence lifestyle;[109]

- Eyak Corporation's decision to engage in clear-cut logging and timber sales in areas that many Eyak tribal members viewed as sacred ancestral lands;[110]

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[108] *See* Kizzia, *supra* note 101 ("A score of residents in the village of 370 [Kivalina] have had good-paying jobs at Red Dog . . . . But many of them have moved away to Anchorage and now commute to work by jet.").

[109] *See* Stephen E. Cotton, *Dispatch From the Arctic: In Two Remote Native Villages, "Think Globally, Act Locally" is an Understatement*, ENVTL. ADVOCATE (Spring 2009), at 2-3, *available at* www.trustees.org/Documents/TrusteesforAK-NL43991.aspx; *see also* Gail Phillips & Arliss Sturgulewski, Commentary, *Alaska Now Has Funds to Revisit Big, Bold Ideas of the Past*, ANCHORAGE DAILY NEWS, July 3, 2008, at B5, *available at* 2008 WLNR 12535520 (arguing for developing this resource, and building a railroad from the mine to the coast to help transport the coal).

[110] *See* Marilyn J. Ward Ford, *Twenty Five Years of the Alaska Native Claims Settlement Act: Self Determination or Destruction of the Heritage, Culture, and Way of*

- ASRC and Doyon's antagonism over plans for inland oil drilling, including proposals to open ANWR, which re-enacts traditional tribal antipathies in a corporate context;[111]

Life of Alaska's Native Americans?, 12 J. ENVTL. L. & LITIG. 305, 328–33 (1997) (summarizing conflict and lawsuits filed by Eyak tribal members). From an environmental justice perspective, the most noteworthy aspect of this dispute is that it occurs at the microcosmic level of the village corporation, showing that concerns over disproportionate representation and access to the decision-making process can play out here as well. This paper previously argued for the potential disenfranchisement of a village outvoted by a regional corporation, *see supra* Part II.A.1; the Eyaks' experience shows that the insidious effects of a corporate voting structure may also be felt at the village corporation level. As Ford summarizes, only fifteen of 326 shareholders in the Eyak village corporation at this time were actually Eyaks; the rest were from other, non-local Native groups. Ford, *supra*, at 328. The result is that most village corporation shareholders were being asked to protect ancestral lands of scant personal significance, which they declined to do in the interest of profitable resource development. *See also* Eyak Traditional Elders Council v. Sherstone, Inc., 904 P.2d 420, 422 (Alaska 1995) (resolving the Elders Council's voluntary dismissal of suit to halt logging on lands believed to be historical burial ground, withdrawn as moot once defendant completed logging operations on the site); Dune Lankard, *Sacred Places: Indian Rights After the Exxon Valdez Oil Spill*, 10 FORDHAM ENVTL. L.J. 371 (1999) (symposium speech by *Elders Council* plaintiff).

[111] Proposals to drill for oil in the coastal plain of the Arctic National Wildlife Refuge have been advanced for some time. The Obama administration is guarded about this prospect, but Alaska's congressional delegation continues its ongoing attempts to open the refuge for development. *ANWR Drilling Remains a Question*, ANCHORAGE DAILY NEWS, March 17, 2009, at A5, *available at* 2009 WLNR 5155375. In this context, it is often noted that the most visible Native opponents of ANWR development, the inland Gwich'in, live some distance from the refuge itself, while the Iñupiat of Kaktovik, who actually live on the coastal plain, favor development. *See, e.g.*, ROBERT JOHN MCMONAGLE, CARIBOU AND CONOCO: RETHINKING ENVIRONMENTAL POLICIES IN ALASKA'S ANWR AND BEYOND 73–74 (2008); *cf. Alaskan Natives Support Development*, ANWR, http://www.anwr.org/People/Alaskan-Natives-Support-Development.php (last visited Jan. 13, 2012) (a pro-development lobbying group). Lost in the ANWR publicity, and competing claims over who can serve as the nation's Native conscience, are two complicating facts. One, many North Slope Iñupiat support development in ANWR specifically because it will bring oil production onshore, thereby obviating risks from the alternative: expanded oil production in the Beaufort Sea, with the chance for off-shore oil spills and resulting harm to the Iñupiat's whaling culture. *See* Marie Carroll, Letter from the People, *Human Rights Group Picked One Set of Natives' Desires Over Another*, ANCHORAGE DAILY NEWS, Nov. 2, 2005, at B8, *available at* 2005 WLNR 17731309 (letter from Iñupiaq Barrow resident). Two, the Iñupiat and the Gwich'in do not, historically, like one another. *See* ERNEST S. BURCH, ALLIANCE AND CONFLICT: THE WORLD SYSTEM OF THE IÑUPIAQ ESKIMOS 124, 125–27 (2005) (explaining history of Gwich'in-initiated hostilities towards Iñupiat); Shepard Krech III, *Beyond The Ecological Indian*, *in* NATIVE AMERICANS AND THE ENVIRONMENT: PERSPECTIVES ON THE ECOLOGICAL INDIAN 22–23 (Michael E. Harkin & David Rich Lewis eds., 2007)

- Doyon's less-publicized attempts to procure land in the Yukon Flats National Wildlife Refuge for oil and gas development, through a land swap with the federal government; local villagers have been skeptical of Doyon's promises of jobs and economic development in exchange for a slight risk of environmental harm;[112] and/or

- ASRC's attempts to engage in limited offshore oil drilling, over the objections of subsistence hunters in one ASRC village, Kaktovik, concerned about the effects of drilling on their bowhead whale harvest.[113]

(using Natives and ANWR to critique environmental action based on "an image of uncorrupted indigenous nobility"). It is difficult to avoid the conclusion that the Iñupiat and Gwich'in are putting their own interests above those of another indigenous group in lobbying for or against development. That is, even when an ANC lacks the power to make a development decision directly, it can still play a part in problems with procedural injustice, as would happen if the subsistence lifestyle of Doyon's Gwich'in people were harmed by oil drilling occurring at the instigation of ASRC's Iñupiat, in an area important to the Gwich'in but not under their direct control.

[112] *See Federal Agency Postpones Decision on Yukon Flats Swap: Land Would Be Exchanged for Possible Oil-Rich Sites*, ANCHORAGE DAILY NEWS, Sept. 7, 2008, at A12 (U.S. Fish and Wildlife Service delays decision on land swap to complete more detailed land appraisal); Tom Kizzia, *Yukon Flats Villages Remain Opposed to Drilling: Tribal Leaders Say Oil Benefits are Short-Term*, ANCHORAGE DAILY NEWS, July 21, 2008, at A1, *available at* 2008 WLNR 13923828 (quoting concerned residents of Arctic Village, outside the boundaries of Doyon regional corporation but dependent on the wetlands basin that would be affected by development); *see also* News Release, Doyon, Ltd., Doyon, Limited Announces New Oil and Gas Exploration in Yukon Flats (Jan. 21, 2010), *available at* www.doyon.com/pdfs/PressReleases/New%20Yukon%20Flats%20Exploration%20012110%20FINAL.pdf.

[113] Drilling opponents were initially, but not ultimately, successful in a recent legal challenge to administrative approval of ASRC's desired development. Alaska Wilderness League v. Kempthorne, 548 F.3d 815, 825–33 (9th Cir. 2008) (holding that federal Minerals Management Service violated NEPA by failing to take the required "hard look" at Shell Oil's proposal's impacts on endangered bowhead whales and general Iñupiaq subsistence activities), *withdrawn and vacated*, 559 F.3d 916 (9th Cir. 2009). A Native plaintiff in *Alaska Wilderness League*, a subsistence hunter out of Kaktovik, responded to the first decision by emphasizing the importance of protecting subsistence activities. Robert Thompson, Op-Ed., *Push For Offshore Drilling Disregards Ocean, Culture*, ANCHORAGE DAILY NEWS, Dec. 23, 2008, at B5, *available at* 2008 WLNR 24770737. Mr. Thompson's concerns are not new ones; fifteen years earlier, a whaling captain out of Nuiqsut, also in the ASRC region, expressed similar misgivings about offshore oil activity. *See* David Whitney, *Whalers See Changes: Natives Believe Drilling Threatens Hunting*, ANCHORAGE DAILY NEWS, Sept. 7, 1993, at B1, *available at* 1993 WLNR 4629113.

CONCLUSION: HISTORICAL BACKGROUND REDUX, OR, WHOSE FAULT IS THIS, ANYWAY?

As the preceding analysis shows, ANCSA in general, and some Native Corporations' development decisions in particular, come in for justifiable criticism. There are issues with procedural injustice stemming from the relationship between village and regional corporations, exacerbated by the distances and cultural issues involved and some peculiar quirks of the ANCs as corporations. Such criticisms, however, treat the ANCSA corporations system as the status quo, or as a received model for negotiating complex issues of tribal identity and resource management. This section takes into account some historical aspects of the Native corporations' creation. It begins with a brief survey of contemporary analysis following the Act's passage.

Critiques of the corporation model as a way to "manage" land within Native culture are ample. This is the point of *Village Journey*, a compilation of Native displeasure with ANCSA a decade after its passage, drawn from the author's travels through dozens of Alaska villages in summer 1984.[114] Sentiments such as "[w]hen you look through the corporate eye, our relationship to the land is altered" fill every page; as the author, a Canadian jurist, concluded, "[t]he promise of ANCSA has not been fulfilled."[115] Later anthropologists criticized ANCSA as "a major effort at social engineering by legislative fiat,"[116] while a political policy scholar suggested that ANCSA's goals were "thoroughly insensitive to the culture, abilities, and concerns of Natives on the receiving end."[117] One law professor posed a somewhat tendentious choice between viewing ANCSA as "self determination" or "destruction of [Natives'] heritage, culture, and way of life," coming down firmly in the latter camp.[118] Alaska Natives, finally, have spoken to the "dichotomy" that ANCSA creates between a corporate structure of private land ownership and a traditional view of community stewardship, or between historic respect for a people's elders and

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[114] BERGER, *supra* note 1.

[115] *Id.* at 27, 65.

[116] DALEY & JAMES, *supra* note 3, at 191.

[117] JOHN S. DRYZEK, DISCURSIVE DEMOCRACY: POLITICS, POLICY, AND POLITICAL SCIENCE 118 (1990).

[118] Ford, *supra* note 110, at 336.

modern capitalism with new and younger leadership.[119] As one correspondent wrote to the *Tundra Times* in the early 1970s, "[ANCSA] is based on *competition*; the Native way is based on *cooperation*."[120]

Such criticism, while likely justified, is addressed to the present realities of the Native corporations. This focus likewise characterizes much scholarship on the related issue of ANCSA and Native sovereignty. While a strict legal analysis of this question can be relatively brief,[121] concern for sovereignty generally, in the broader sense of self-determination, has been more expansive. As one recent scholar reasoned, ANCSA may be viewed as a boon to Native sovereignty, in that it granted Natives clear title to (some) land, established a vehicle for self-sufficiency and economic success, and let Natives decide how to use their resources.[122] Conversely, the Act may also be viewed as harmful to sovereignty, in that it ended the powers and protections of Indian country in Alaska, limited Natives' ability to choose governance structures, and forced them to make resource management decisions within a resolutely corporate framework.[123] Other scholars have made similar points, with a similar focus.[124]

Such analyses are helpful, but they do not go far enough. While they are pragmatically justified in focusing on the Native corporations as they currently exist, insofar as ANCSA's corporate

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[119] Allaway & Mallott, *supra* note 1, at 140–42.

[120] Daley & James, *supra* note 3, at 192 (emphasis in original) (quoting FREDERICK SEGAYUK BIGJIM, LETTERS TO HOWARD: AN INTERPRETATION OF THE ALASKA NATIVE LAND CLAIMS 82–83 (1974)).

[121] ANCSA simply did not address the issue of Native claims to sovereignty; questions of tribal jurisdiction had to be resolved in the courts. *See* Case, *supra* note 2, at 149, 151–52. The most relevant cases here are *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 526–34 (1998) (holding that ANCSA lands do not constitute "Indian country"), and *John v. Baker*, 982 P.2d 738 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000) (holding that tribes have jurisdiction on the basis of territory or membership, and that a tribal court decision from a tribe with proper jurisdiction should be accorded comity in state courts); *see also* Geoffrey D. Strommer & Stephen D. Osborne, *"Indian Country" and the Nature and Scope of Tribal Self-Government in Alaska*, 22 ALASKA L. REV. 1 (2005).

[122] Eric C. Chaffee, *Business Organizations and Tribal Self-Determination: A Critical Reexamination of the Alaska Native Claims Settlement Act*, 25 ALASKA L. REV. 107, 123–27 (2008) (discussing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823)).

[123] *Id.* at 136–40 (discussing *Venetie* on the question of Indian country).

[124] *See, e.g.*, SKINNER, *supra* note 1, at 81–99; Allaway & Mallott, *supra* note 1, at 145–46.

model is unlikely to be disbanded, they would benefit from the historical perspective afforded by considering the circumstances surrounding the Act's passage. Such an expanded viewpoint raises some troubling issues about the Act.

From a standpoint of distributive justice, it is telling that ANCSA placed known oil reserves off-limits for the initial Native land selections.[125] This one detail is a potent reminder that the forces advocating for the Act's passage included the combined resources of both Big Oil and a young state desperate for the income that would result from resolving Native land claims and leasing state land to oil companies. Not only did the Act "solve" the problem of aboriginal land claims by awarding Alaska Natives title to roughly twelve percent of the state they had inhabited for millennia,[126] it ensured that Native groups would not gain possession of the most valuable known resources on this land. This raises an inconvenient point for the question of "who gets what?," the gravamen of any distributive justice analysis.[127] The answer here is that the Natives got a relatively small portion of their ancestral lands, not including the most profitable areas, while the state happily moved ahead with its oil leases.

Questions of procedural justice are also apposite. While the Alaska Federation of Natives (AFN) voted to "approve" ANCSA by a considerable majority, 511 to 56, at an Anchorage-based convention, the fact remains that, due in part to distance and logistics, no one voting on the Act in Anchorage had actually seen the final version of the statute at the time of its passage in Washington.[128] Indeed, the Act had been passed hours earlier, before the Native delegates' largely ceremonial vote.[129] There were also the logistical challenges associated with surveying

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[125] 43 U.S.C. §§ 1611(a)(1), 1613(f) (2006).

[126] Compare one contemporary Native response to this solution: "Why do we want forty million acres of hunting rights when we've got the whole state?" DONALD CRAIG MITCHELL, TAKE MY LAND, TAKE MY LIFE: THE STORY OF CONGRESS'S HISTORIC SETTLEMENT OF ALASKA NATIVE LAND CLAIMS, 1960-1971, at 265 (2001).

[127] *See* Kuehn, *supra* note 38, at 10,683-84.

[128] BARRY SCOTT ZELLEN, BREAKING THE ICE: FROM LAND CLAIMS TO TRIBAL SOVEREIGNTY IN THE ARCTIC 44 (2008) (characterizing the AFN's endorsement as a "vote of faith").

[129] MITCHELL, *supra* note 126, at 487–93 (explaining that President Nixon had already signed the bill prior to learning of the Natives' stance on it, as he had no intention of vetoing the Act regardless of AFN's vote).

community sentiment from more than 200 Native settlements across much of Alaska, in an era when most villages lacked phone service or even radio reception.[130] It is unsurprising that many of the villagers surveyed in Berger's account express complaints about the process that redound to problems with procedural justice.[131]

Finally, aspects of social justice likewise gain more resonance when viewed from a historical perspective. While some (not unjustifiably) applaud ANCSA for treating Alaska Natives more equitably than most Native Americans in this country,[132] a focus on the realities of the corporations' early administration reveals a less rosy picture. In this light, the effect of ANCSA was to place Native groups ostensibly in charge of their own affairs, while forcing an inexperienced people into a foreign business model and leaving them with insufficient funds to successfully administer it.[133] This does not seem all that fair. Likewise, Kuehn's concerns about forcing tribes to play out social justice disputes within themselves, "as some members focus on the putative economic benefits from such facilities while others look to the environmental and cultural damages that may result,"[134] while a valid critique as applied to the Native corporations, may be tempered by a consideration of the alternatives available to Alaska Native leaders in the late 1960s and early 70s. When their

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[130] One author describes the disparity between the Washington reality and the good-faith understanding of village-based delegates to the AFN as an "unbridgeable chasm." MITCHELL, *supra* note 126, at 488.

[131] BERGER, *supra* note 1, at 6, 15, 26, 122, 124, 125.

[132] *See, e.g.*, ALEXANDRA J. MCCLANAHAN, ALASKA NATIVE CORPORATIONS: *SAKUUKTUGUT*, "WE ARE WORKING INCREDIBLY HARD": THE LAND, THE MONEY, THE HISTORY OF THE ALASKA CLAIMS SETTLEMENT ACT OF 1971 AND HOW ALASKAN NATIVE PEOPLE ARE WRITING AN EPIC STORY IN CULTURAL AND ECONOMIC DEVELOPMENT 6, 99, 144 (2006); Carl H. Marrs, *ANCSA, An Act of Self-Determination: Harnessing Business Endeavors to Achieve Alaska Native Goals*, 27.3 CULT. SURVIVAL Q. (Fall 2003), *available at* http://www.culturalsurvival.org/publications/cultural-survival-quarterly/united-states/ancsa-act-self-determination-harnessing-busin; SKINNER, *supra* note 1, at 117; ZELLEN, *supra* note 128, at 62–63; *cf.* Jones v. State, 936 P.2d 1263, 1264 (Alaska Ct. App. 1997) ("White society developed a distinctive relationship with the indigenous peoples of Alaska, different from the whites' relationship with the indigenous peoples of the Lower 48.").

[133] *Cf.* BERGER, *supra* note 1, at 33 (explaining that initial monetary distributions from the Alaska Native Fund were woefully inadequate compared to the cost of administering a corporation).

[134] Kuehn, *supra* note 38, at 10,701.

options were to accede to a legislative solution granting them some land, or risk losing control of all land, their acquiescence to ANCSA makes perfect sense.[135] It does not, however, have to make later developments their fault.

Indeed, while this paper addressed, at some length, issues of procedural justice stemming from NANA's treatment of Kivalina, the real question of procedural justice here may be how NANA was placed in a position where it would be forced to take such action in the first place. A broader, historical perspective on the Native corporations should take into account not only the corporations as they currently exist, but also the Act that created them. In this light, questions about the corporations' resource use, generally phrased as "what are they doing with the resources they have?," can be more accurately stated as, "how did they obtain these resources, and how much say did they have in the matter?" From a sovereignty perspective, similarly, we can laud ANCSA for the increased control that it gave Native groups—yet we should also ask, within what parameters can they exercise this control? The answer, for the Native corporations, is that they do so within a corporate structure all but forced upon them by a distant Congress, a structure and worldview anathematic to their culture. There are indeed issues with procedural justice here, in both the passage of ANCSA and the operation of the ANCs it created, but the Native corporations are hardly the only culpable party.

Gavin Kentch[*]

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[135] *Cf.* BERGER, *supra* note 1, at 26 ("Although [Native association leaders] realized that ANCSA was defective on many counts, they nonetheless felt it was the best deal they could get at the time.").

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ENVIRONMENTAL JUSTICE: DECIPHERING THE MAZE OF A PRIVATE RIGHT OF ACTION

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INTRODUCTION

The concept of environmental justice involves a grassroots movement that fights for the equal treatment of citizens with respect to protections under environmental, health, energy, and land use regulations.[1] In general, the movement questions environmental decisions of private industry and governmental bodies that have "potentially serious equity implications, especially for minority and low-income communities."[2] Litigation in this segment of environmental law focuses primarily on the possible discriminatory practices in the permitting and siting processes of environmentally harmful facilities, and, more importantly, the alleged disparate impacts these processes impose upon minorities.[3] Although the movement itself and the environmental justice concept are not new issues,[4] there is no firmly rooted definition of "environmental justice." All other things being equal, the initial problem of defining "environmental justice" is a testament to the public tension and strong viewpoints among

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[1] Amanda K. Franzen, Comment, *The Time Is Now for Environmental Justice: Congress Must Take Action by Codifying Executive Order 12898*, 17 PENN ST. ENVTL. L. REV. 379, 382-83 (2009).

[2] CHRISTOPHER H. FOREMAN, JR., THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE 1 (1998).

[3] Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 524 (1994) (stating that "siting disputes have been the primary context for environmental justice litigation thus far"); *see also* Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631, 632 (2000) (describing "the ongoing debate over private claims brought under Title VI [of the Civil Rights Act of 1964] against local agencies for issuing permits to industrial facilities" that allegedly cause a disparate impact on minority populations).

[4] In fact, it has been over twenty-five years since environmental racism was first recognized nationally in 1982 after a protest arising in Warren County, North Carolina. Franzen, *supra* note 1, at 381-84. See THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008), for a comprehensive treatise on environmental justice jurisprudence.

various stakeholders affected by equality concerns within this environmental milieu.

Even today, "there is no universally accepted definition of environmental justice."[5] An environmental justice plaintiff (EJ Plaintiff) typically claims that a government agency discriminated on the basis of race in the agency's decision-making process for granting permits to hazardous waste landfill operators, nuclear power plants, or other potentially harmful facilities in an area where a large number of minority populations reside.[6] Thus, a proponent of environmental justice would subscribe to the notion that particular communities, mostly those composed of people of color and the poor, "have been forced to bear *disproportionately* the external costs of industrial processes," and that these costs should be "borne proportionately by all who reap the benefits of these processes."[7] In contrast, "the conservative lexicon" would define environmental injustice as "excessive regulatory encroachment on private property rights . . . ."[8]

Importantly, the U.S. Environmental Protection Agency's (EPA) definition, which is heavily criticized by environmental justice proponents, attempts to strike a societal balance by providing a facially neutral alternative.[9] In late 2006, the EPA

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[5] Michael B. Gerrard, *Preface to the Second Edition* of THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, at xxxiii, xxxiii (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008).

[6] Philip Weinberg, *Equal Protection*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 3, 6 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008).

[7] KENNETH A. MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE: READINGS AND COMMENTARY OF ENVIRONMENTAL LAW AND PRACTICE 192 (1995) (emphasis added).

[8] FOREMAN, *supra* note 2, at 30.

[9] On June 22, 2005, the EPA issued a notice in the Federal Register stating that it would begin to take public comments on a draft "Environmental Strategic Plan." Bradford C. Mank, *Title VI*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 23, 29 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008); *Environmental Justice in EPA's Strategic Planning Process*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/compliance/resources/publications/data/planning/strategicplan/ej/index.html (last visited Jan. 29, 2012). Following the public comment period, however, the EPA decided not to issue a separate strategic plan and concluded that it would instead integrate the issue into the agency's planning and budgeting process. *Environmental Justice in EPA's Strategic Planning Process*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/compliance/resources/publications/data/planning/strategicplan/ej/index.html (last visited Jan. 29, 2012).

issued its 2006-2011 Strategic Plan, which purported to implement environmental justice ideals throughout the agency and prescribed a broad definition of environmental justice.[10] The EPA defines "environmental justice" as:

> [T]he fair treatment and meaningful involvement of *all people regardless of race, color, national origin, or income* with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. . . . Fair treatment means that *no group of people* should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies. Meaningful involvement means that: (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) their concerns will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.[11]

While recognizing that minority and low-income populations may be frequently exposed to adverse human effects,[12] the agency's neutral, racially non-bias approach is at odds with other definitions espoused by environmental justice advocates, a Clinton-era executive order issued in 1994, and proposed legislation currently on the congressional table.[13]

Although finding a universally acceptable definition for "environmental justice" is no easy task, such a search exemplifies a separate and distinct story underpinning this entire body of law and social policy. To date, individuals claiming environmental inequities have exhausted most, if not all, remedial measures to cure alleged environmental injustices. Claimants have attempted

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[10] *Basic Information*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/compliance/environmentaljustice/basics/index.html (last visited Jan. 29, 2012).

[11] *Id.* (emphasis added).

[12] U.S. ENVTL. PROT. AGENCY, 2006-2011 EPA STRATEGIC PLAN: CHARTING OUR COURSE 61-62 (Sept. 2006), *available at* http://nepis.epa.gov/Adobe/PDF/P1001IPK.PDF.

[13] *See* Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994); Manu Raju, *EPA's Draft Equity Plan Drops Race as a Factor in Future Decisions*, INSIDE THE EPA, July 1, 2005, *available at* 2005 WLNR 10287377; *see also* discussion *infra* Part II.

to secure relief through various legal theories, including claims based on the equal protection doctrine, Title VI of The Civil Rights Act of 1964, private enforcement of Executive Order 12,898, and environmental laws that focus on procedure or public participation.[14]

The purpose of this Article is to analyze the environmental justice problem through a two-tier framework in an effort to cogently reach the conclusion that the sole avenue of relief must derive from amendments to Title VI of the Civil Rights Act of 1964. The first tier (TIER 1) entails increasing awareness of the problem at the federal level. At the other end of the spectrum, the second tier (TIER 2) involves establishing a private right of action to enforce the disparate impact standard of discrimination against governmental agencies that receive federal funds from the EPA. Regarding the TIER 1 problem, this Article examines the once proposed Environmental Justice Act of 2008,[15] which was directed at the development of a better federal cognizance of the

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[14] *See* Cole, *supra* note 3, at 526; James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125, 169-71 (1994).

[15] Environmental Justice Act of 2008, S. 642, 110th Cong. (2007), 2007 CONG US S 642 (Westlaw). Representative John Lewis and Senator Al Gore proposed the original version of this Act in 1992, entitled The Environmental Justice Act of 1992. *Environmental Justice Timeline*, AVOICE, http://www.avoiceonline.org/environmental/timeline.html (last visited Jan. 30, 2012) ("The act addressed key health and political access issues by requiring EOP and other agencies to conduct studies of toxic health impacts, to inspect toxic facilities in the one hundred most heavily exposed cities on a regular basis and provide technical assistance to community groups in those counties."). "The Environmental Justice Act was redrafted and reintroduced" in 1993. *Id.* The bill was subsequently reintroduced in 2005. For the text of the bill, see GOVTRACK, http://www.govtrack.us/ (search "Environmental Justice Act"; then change the "Congress Term" box to "109th Congress (2005-2006)"; then click search; then follow "H.R. 427: Environmental Justice Act of 2005" hyperlink). In 2007, the bill was again redrafted and reintroduced, both in the House of Representatives and the Senate, but this time with the purpose of codifying Executive Order 12,898. *See id.* (search "Environmental Justice Act"; then change the "Congress Term" box to "110th Congress (2007-2008)"; then click search; then follow "H.R. 1103: Environmental Justice Act of 2007" or "S. 642: Environmental Justice Act of 2008" hyperlink). The version in the House of Representatives was labeled as "The Environmental Justice Act of 2007," the last action occurring on Oct. 4, 2007 when the House Energy and Commerce Committee held subcommittee hearings. *See id.* The Senate version, labeled as "The Environmental Justice Act of 2008," was reported out of the Senate Environment and Public Works Committee, with revisions, on Sept. 24, 2008. *See id.* This Article will reference the 2008 Act, as that is the most recent version.

environmental justice problem by strengthening inter-executive branch collaboration and review of agency decision making. While this Article applauds legislative efforts to solve the TIER 1 problem, it posits that improving the structural processes within the federal government is only the first solution to a two-part problem. Ultimately, this Article will argue that the TIER 2 problem—securing immediate and appropriate declaratory or equitable relief for environmental justice violations under the disparate impact standard of discrimination—is solved only by amending Title VI of the Civil Rights Act of 1964 with legislation similar to the Environmental Justice Enforcement Act of 2008.[16]

Part I of this Article focuses on the failure of equal-protection-based environmental justice claims as a form of relief for the EJ Plaintiff. Next, Part II explains the pitfalls of President Bill Clinton's executive mandate to federal agencies to employ environmental justice policies and the EPA's curtailment of the mandate since its issuance. Building upon the historical backdrop of this pseudo-political and policy-driven initiative, the Article then discusses previous legislation, which failed to be enacted, that codifies President Clinton's mandate. The Article then articulates arguments suggesting that such legislation will not effectively cure environmental justice concerns, and prompts the passage of a more comprehensive legislative scheme that will alleviate the failures in securing environmental justice. Part III discusses Title VI of the Civil Rights Act of 1964 in the environmental justice context. Specifically, this Part highlights the current administrative process within the EPA for handling Title VI complaints, the process's relative policies and guidelines, and an analysis of the flaws within the system. Finally, in Part IV and in the Conclusion, this Article determines that the sole means for solving the TIER 2 problem is through amending Title VI of the Civil Rights Act of 1964 via the reintroduction and passage of the Environmental Justice Enforcement Act of 2008.

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[16] Environmental Justice Enforcement Act of 2008, S. 2918, 110th Cong. (2008), 2007 CONG US S 2918 (Westlaw).

I. THE FAILED LEGAL TACTIC OF THE EQUAL PROTECTION DOCTRINE

A. Equal Protection Jurisprudence: A Brief Background

The Equal Protection Doctrine is triggered,[17] and the guarantee of its protection is violated, in two basic ways: (1) when a government's rules or programs classifies so as to distinguish between individuals "who should be regarded as similarly situated";[18] and (2) when a government's rules or programs fail to classify individuals who "should be regarded as differently situated."[19] Denials of equal protection of the first type are often

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[17] Procedurally speaking, an EJ Plaintiff may challenge alleged discriminatory practices of state, municipal, or local governments under the equal protection clause of the Fourteenth Amendment or against the federal government under the due process clause of the Fifth Amendment. *See* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."); U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *see also* Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954) (finding that the Fifth Amendment's due process clause and the Fourteenth Amendment's equal protection clause "are not mutually exclusive," and that discrimination by the federal government "may be so unjustifiable as to be violative of due process"). Moreover, "[t]he most common procedural vehicle for the assertion of equal protection claims is a suit [brought] under 42 U.S.C. § 1983," which provides a federal statutory remedy for alleged state and local violations of federal laws or constitutional rights. Weinberg, *supra* note 6, at 18. Section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2006).

[18] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1438 (2d ed. 1988). This type of equal protection violation usually involves express classifications of individuals that result in facial discrimination. *See id.* ("[I]ndividuals might be classified as eligible or ineligible for attendance at a particular public school based on their race (an alleged denial of treatment as equals)."); *see also* Plyler v. Doe, 457 U.S. 202, 215-16 (1982) (applying this fundamental principle of equal protection jurisprudence to a Texas law that withheld from local school districts any state funds for educating, and authorized the local school districts to deny enrollment to, illegal alien children).

[19] TRIBE, *supra* note 18, at 1438. Conceptually speaking, the government's failure to use express classifications to protect individuals from de facto discrimination

coined as "de jure discriminations"; deprivations of the second type are commonly referred to as "de facto discriminations."[20] The contours of the doctrine's second scenario behoove the realm of environmental justice litigation, i.e., the doctrine's protection extends to those persons unequally affected by environmental decision-making that fails to take special notice that these persons are differently situated and in need of special protection. De facto discriminations, such as those in the arena of environmental justice, are particularly resistant to a successful constitutional attack because the concept of "depriv[ing] persons of the right to be treated as equals . . . [is] usually . . . viewed as only a formal requirement."[21] Equal Protection Law, as it applies to notions of "environmental justice for all," not only exhibits this arbitrary legalism, but also explains why claims based on the doctrine have failed in the environmental justice context. Otherwise stated, the amorphous ideal of "justice," combined with the even more shapeless concept of what constitutes "environmental equality," typifies the futile nature of the equal protection doctrine as a tool to unveil private racial animus in the implementation of facially neutral statutes, ordinances, and agency decisions. As one commentator stated, the inability of federal courts to find racial animus from de facto discriminations, "reflects the long term failure of civil rights law to address a historic form of racial discrimination perpetuated through facially neutral policies."[22]

Apart from the judiciary grappling to find congruence amongst dogmatic legal principles and private societal discrimination, the true hurdle to an EJ Plaintiff's use of the equal protection doctrine is proving invidious discrimination. Racial discrimination is the primary complaint of an EJ Plaintiff, which

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necessarily results in the application of facially neutral laws in a discriminatory manner.

[20] *Id.* at 1439.

[21] *Id.* at 1439 n.19; *see also id.* at 1439 n.21 ("The relatively more immune position of de facto discriminations is traceable, at bottom, to a reluctance—diminishing over the long run but still very much a reality—to recognize and especially to enforce affirmative governmental duties to redress disadvantages or injuries not thought to be actively engineered by government itself.").

[22] Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENVTL. L. REV. 51, 103-04 (2009) (analogizing de facto segregation in housing and education to environmental racism).

therefore causes the doctrine to take on a deeper significance within environmental justice litigation.[23] The doctrine prohibits governmental action that is either facially discriminatory,[24] facially neutral yet administered or applied in a discriminatory manner,[25] or governmental action that has a discriminatory purpose.[26] In cases involving distinctions not drawn according to race, challenged governmental action is subject to rational basis review, i.e., whether the action is *rationally related* to a *legitimate* governmental purpose.[27] However, the Supreme Court has long held that acts which discriminate on the basis of race, national origin, or other suspect class are subject to strict scrutiny review, i.e., whether the government can prove that its action is *narrowly tailored* to serve a *compelling* governmental interest.[28]

The distinction between the standards of judicial review gains greater importance in the context of environmental justice because the focus "has shifted to laws, neutral on their face, that are claimed to have been unequally applied."[29] Prior to the U.S. Supreme Court's landmark decisions in *Washington v. Davis*,[30] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[31] plaintiffs could prevail on an equal

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[23] Weinberg, *supra* note 6, at 6-7.

[24] Indeed, every law, to have effect, does classify people in some manner. However, classification here is not used in a broad sense; rather, it means laws that explicitly divide the population into various subgroups, which results in unequal treatment. It has been said that "laws that discriminate outright against minorities on the basis of race are unlikely to resurface." *Id.* at 6. This is because discriminatory "intent is inferred from the classification itself." *Id.* at 7.

[25] *See* Yick Wo v. Hopkins, 118 U.S. 356, 362-63 (1886).

[26] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

[27] Loving v. Virginia, 388 U.S. 1, 9 (1967).

[28] Plyler v. Doe, 457 U.S. 202, 217-18 (1982). Additionally, a court may take a middle-ground approach using intermediate scrutiny:

> [C]ertain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.

Id. at 217-18.

[29] Weinberg, *supra* note 6, at 6.

[30] 426 U.S. 229 (1976).

[31] 429 U.S. 252 (1977).

protection theory by proving that a governmental practice "had a statistically discriminatory impact."[32] In *Davis*, the Court held that a claim of racial discrimination must ultimately be traced to a racially discriminatory purpose, and that while "[d]isproportionate impact is not irrelevant, . . . it is not the sole touchstone of . . . invidious racial discrimination" and does not trigger equal protection guaranteed by the Constitution on its own.[33] The Court reaffirmed *Davis* in the *Arlington Heights* decision, holding that the requisite showing of intent to discriminate only requires that invidious discrimination was a motivating factor, and that such intent may be proven by circumstantial and direct evidence.[34] Thus, as a general rule, neutral governmental actions, e.g., land use, zoning, or permitting decisions, are subject to the lower rational basis review. The difficulty, though, is the exacting burden on the EJ Plaintiff to affirmatively show racial animus behind these same types of decisions so that the higher burden of strict scrutiny applies. Consequently, environmental justice suits based on an equal protection theory almost consistently fail because of the EJ Plaintiff's inability to prove discriminatory intent.[35]

B. Hammering a Square Peg in a Round Hole: The Equal Protection Doctrine and Environmental Justice Litigation

In the wake of *Davis* and *Arlington Heights*, claimants alleging environmental discrimination have not been completely hampered in proving that the basis for siting and permitting decisions involved discriminatory intent; however, the obstacles remain extremely difficult to overcome.[36] For example, in one of

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[32] Naikang Tsao, Note, *Ameliorating Environmental Racism: A Citizens' Guide to Combating the Discriminatory Siting of Toxic Waste Dumps*, 67 N.Y.U. L. REV. 366, 406 (1992) (citing Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971)).

[33] *Davis*, 426 U.S. at 242.

[34] *Arlington Heights*, 429 U.S. at 266-68. Evidence of intent to discriminate includes: (1) whether the "official action . . . bears more heavily on one race than another"; (2) "a clear pattern" of discrimination, "unexplainable on grounds other than race," that emerges from the official action; (3) "[t]he historical background of the decision"; (4) "[t]he specific sequence of events leading up to the challenged decision"; (5) "[d]epartures from the normal procedural sequence"; (6) "[s]ubstantive departures"; and (7) "legislative or administrative history." *Id.*

[35] Weinberg, *supra* note 6, at 10.

[36] *Id.* at 13.

the earliest environmental justice cases grounded in equal protection jurisprudence, the court in *Bean v. Southwestern Waste Management Corp.*[37] rejected the plaintiff's contention that racial discrimination motivated the Texas Department of Health's decision to grant the defendant, Southwestern Waste Management, a permit to operate a solid waste facility.[38] In *Bean*, the plaintiffs offered statistical data to advance two alternative theories of liability based on racial discrimination in an attempt to obtain a preliminary injunction against the granting of the permit.[39]

The plaintiff's first theory rested on the assertion that approval of the waste facility permit was part of a pattern or practice of discrimination.[40] In examining the plaintiff's data, the court found that the data failed to establish a "pattern or practice of discrimination" by the permitting agency and, further, that there was no supplemental *Arlington Heights* evidence that supported such a claim.[41] The plaintiff's second theory postulated that the "approval of the permit, in the context of the historical placement of solid waste sites and the events surrounding the application, constituted discrimination."[42] Again, the court found that the set of data proffered by the plaintiffs failed to meet the standard for proving the discriminatory application of facially neutral permitting laws and regulations.[43] In the end, the court held that the plaintiffs did not establish a substantial likelihood of success on the merits of their contentions involving purposeful racial discrimination, finding that no statistical disparity existed

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[37] 482 F. Supp. 673 (S.D. Tex. 1979). To review other cases where a plaintiff's equal protection claim failed, see *Rozar v. Mullis*, 85 F.3d 556 (11th Cir. 1996); *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*, 896 F.2d 1264 (11th Cir. 1989); *Cox v. City of Dallas*, No. Civ. A3:98-CV-1763BH, 2004 WL 2108253 (N.D. Tex. Sept. 22, 2004), *aff'd*, 430 F.3d 734 (5th Cir. 2005); *Boyd v. Browner*, 897 F. Supp. 590 (D. D.C. 1995), *aff'd*, 107 F.3d 922 (D.C. Cir. 1996); *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991).

[38] *Bean*, 482 F. Supp. at 680.

[39] *Id.* at 679.

[40] *Id.* at 677. The data indicated "that 58.8% of the sites granted permits . . . were located in census tracts with 25% or less minority population . . . and that 82.4% . . . were located in census tracts with 50% or less minority population at the time of their opening." *Id.*

[41] *Id.* at 677-78.

[42] *Id.* at 678.

[43] *See id.* (citing Yick Wo. v. Hopkins, 118 U.S. 356 (1886)).

and that a large number of sites were located near high Anglo populations.[44] Interestingly, the court subtly examined enumerated other factors from *Arlington Heights*, but ultimately found that the plaintiffs only established that the permit decision "was both unfortunate and insensitive."[45]

Only a handful of courts have permitted EJ Plaintiffs to proceed to trial on an equal protection theory, but these cases are rare and do not involve specific allegations of discriminatory practices in the granting of permits to, or the siting of, potentially harmful facilities in minority communities. Instead, the plaintiffs contend, similar to the plaintiffs in *Miller v. City of Dallas*,[46] that invidious discrimination motivated municipality practices in providing services in a discriminatory manner to its residents.[47] In *Miller*, the plaintiffs claimed that the city had engaged in, and continued to engage in, purposeful racial and ethnic discrimination in providing municipal services to the residents of Cadillac Heights, a predominantly African American area in Dallas, Texas.[48] The court denied the city's motion for summary judgment, finding that the plaintiffs had presented sufficient *Arlington Heights* evidence rebutting the city's contention that it engaged in the alleged discrimination "pursuant to a municipal policy, custom, or usage."[49] However, the court did not try the case

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[44] *Id.* at 679-80. The court noted, however, that all of the other prerequisites for granting the preliminary injunction were present: (1) there was a substantial threat that irreparable injury would occur because the opening of the facility would affect land values, aesthetics, health and safety, and the operation of a school located nearby that contained a predominantly black student body; (2) that the threatened injury to the plaintiffs outweighed the threatened harm to the defendants in not granting the injunction if success on the merits were shown; and (3) the public interest would not be disserved if success on the merits were shown. *Id.* at 677.

[45] *Id.* at 679-80 (observing that "[t]he supplementary non-statistical" data raised questions as to the approval of the permit, e.g., the past denial of a permit for a proposed site in an almost identical location and the seeming non-recognition of land use considerations regarding the placement of the facility near a residential neighborhood and a predominantly black school with no air-conditioning).

[46] No. Civ. A3:98-CV-2955-D, 2002 WL 230834 (N.D. Tex. Feb. 14, 2002).

[47] *Id.* at *1.

[48] *Id.* (contending that Cadillac Heights contained a 98.5% minority population, "46% of whom . . . live in poverty" and asserting that "the City discriminate[d] against [these residents] with respect to flood protection, zoning, protection from industrial nuisances, landfill practices, streets and drainage, and federal funding for housing and community development").

[49] *Id.* at *2.

on its merits because the parties settled after the denial of summary judgment.[50] The *Miller* decision is important in the context of environmental justice because the court vigorously examined the plaintiffs' claims under an *Arlington Heights* analysis and found that a reasonable trier of fact could find intentional race-based discrimination in the city's supply of municipal services.[51]

Markedly, proof of severely disparate impact in municipal services has sufficed to show a denial of equal protection in a small number of other cases.[52] Still, these very few instances of success should not deter from the fact that the equal protection doctrine is an insufficient tool to fix the TIER 2 problem of environmental justice. In one of the best examples illustrating the ineffectiveness of the doctrine, the court in *R.I.S.E., Inc. v. Kay*[53] made it explicit that "the Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups. Rather, it merely prohibits government

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[50] Weinberg, *supra* note 6, at 13.

[51] *Miller*, 2002 WL 230834, at *8.

[52] *See* Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971); Ammons v. Dade City, 594 F. Supp. 1274 (M.D. Fla. 1984), *aff'd*, 783 F.2d 982 (11th Cir. 1986).

[53] 768 F. Supp. 1144 (E.D. Va. 1991). In *R.I.S.E.*, King and Queen County (county) sought to enter a joint-venture landfill with a private corporation. *Id.* at 1146. At that time, three of the county's existing landfill facilities were located in predominately (95%-100%) black populations. *Id.* at 1148. A fourth facility, located in a predominantly white area, was closed as a result of the landfill's effect on property values and the health, safety, and welfare of the county's citizens. *Id.* at 1148-49. The proposed facility was to be located in an area that consisted of 64% black residents and 36% white residents. *Id.* at 1148. In its conclusions of law, the court found that "[t]he placement of landfills in King and Queen County from 1969 to the present has had a disproportionate impact on black residents." *Id.* at 1149. Despite this finding, the court continued on with its analysis, finding that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* Applying the factors from *Arlington Heights*, the court first found that "[t]he impact of an official action—in this case, the historical placement of landfills in predominantly black communities—provides 'an important starting point' for the determination of whether official action was motivated by discriminatory intent." *Id.* (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)). Notwithstanding this statement, the court found that the remaining *Arlington Heights* factors weighed in favor of a conclusion that the permitting decision was not racially motivated, and, "[a]t worst . . . [the decision appeared to be] more concerned about the economic and legal plight of the County as a whole than the sentiments of residents who opposed the placement of the landfill in their neighborhood." *Id.* at 1150.

officials from intentionally discriminating on the basis of race."[54] While this statement is not unfounded in law, it surmises the key struggle between equal protection jurisprudence and environmental justice litigation, namely, that absent unequivocal racial animus, shown by either express classifications or a historic pattern of de facto discriminations, there is an "implicit contemporary presumption that . . . governments act without a discriminatory purpose."[55] If such an implicit presumption exists, it may explain the court's hesitancy in finding a violation of equal protection based on claims of de facto discrimination. Thus, not only does the EJ Plaintiff have to provide "smoking gun" evidence of discriminatory intent, but she also must rebut a presumption of governmental innocence that is encapsulated within a laissez-fair legal atmosphere (at least as it pertains to allegations of governmental discrimination through private individuals).[56] In a poignant, yet eloquent synopsis of the equal protection doctrine within the field of environmental justice, one commentator noted that "[e]nvironmental justice and other litigants seeking to surmount the mount of joy may find themselves trapped in a legal hell occupied by the spirits of past litigants who hoped for racial justice."[57]

II. THE ATTEMPT AT RECTIFYING ENVIRONMENTAL RACISM: FROM EXECUTIVE ORDERS TO ENVIRONMENTAL JUSTICE LEGISLATION

A. Executive Order 12,898: Grassroots Optimism Towards Codification

In 1994, lobbying from civil rights groups dedicated to the grassroots environmental justice movement spurred politicians to address the importance of environmental justice issues.[58] On

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[54] *Id.*

[55] Waterhouse, *supra* note 22, at 69.

[56] *See supra* notes 21-22 and accompanying text.

[57] Waterhouse, *supra* note 22, at 69.

[58] Bradford C. Mank, *Executive Order 12,898*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 101, 101 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008).

February 11, 1994, President Clinton recognized these inequities by issuing Executive Order 12,898 (Order),[59] which provided much for activists to cheer about because a powerful political figure—the President—had coordinated a response to the now widely recognized problem of environmental justice.[60] The Order requires each federal agency, "[t]o the greatest extent practicable and permitted by law, . . . [to] make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations . . . ."[61] Additionally, the Order calls for the creation of an Interagency Working Group on Environmental Justice (Working Group) headed by EPA's administrator,[62] requires agencies to develop environmental justice strategies, conduct research, and engage in data collection and analysis.[63]

The primary setback of the Order is contained in Section 6-609, which explicitly denies private enforcement or judicial review of the Order:

> Judicial Review. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.[64]

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[59] Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629 (Feb. 16, 1994).

[60] FOREMAN, *supra* note 2, at 32.

[61] Exec. Order No. 12,898, 59 Fed. Reg. at 7629.

[62] *Id.* The Working Group is comprised of the heads of fifteen top-level executive agencies. *Id.* Under § 1-102(b)(2) of the Order, the Working Group is to provide guidance to federal agencies on criteria for identifying disproportionate environmental effects on minority and low-income populations, and to ensure that an agency's environmental justice strategy is interpreted and enforced in a consistent manner throughout the agency's programs, activities, and policies. *Id.*

[63] *Id.* at 7630-31.

[64] *Id.* at 7632-33.

As a result of this section, the Order is not binding on any executive department or independent regulatory agency, such as the EPA.[65] Instead, the Order is intended only to improve the internal management of the executive branch and its regulatory agencies.[66] This section leaves the EJ Plaintiff inept to enforce the Order against the EPA so as to conquer the fear that the executive branch and its regulatory agencies will not follow the Order or implement its goals into their respective programs or policies.[67]

As discussed below, Section 6-609 has proved to impose further limitations on a private citizen's attempt to enforce the Order. The "courts, administrative law judges, and agencies have uniformly interpreted Section 6-609 . . . to preclude independent judicial review."[68] Thus, even judicial and administrative recognition of the Order's significance has been found wanting. Notably, were the EPA to "begin reject[ing] or modify[ing] permits because of environmental justice considerations," opposing stakeholders, such as "industry [and] state permitting officials[,] may challenge such decisions" because the Order is neither statutorily authorized by Congress nor binding under the Administrative Procedure Act.[69] Since nearly two decades have passed without substantive changes in EPA regulatory policy regarding environmental justice, it seems that statutory authorization embracing the spirit of the Order is the only way that the Order will have binding effect.[70]

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[65] *See id.*

[66] *Id.*

[67] *See* Franzen, *supra* note 1, at 389 (stating that the Order can only be enforced by leaders of the executive branch and that if these leaders are not concerned with environmental justice, then there are no consequences for failure to abide by the Order's terms).

[68] Mank, *supra* note 58, at 132.

[69] The Order would not be binding under the Administrative Procedure Act because the EPA has not issued new regulations that incorporate the Order. *Id.*

[70] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 304 (1979) (holding that an executive order must be authorized by statute to have binding effect).

B. The Environmental Justice Act of 2008: On the Precipice of Solving the Two-Tiered Problem of Environmental Justice

Dating back to the 105th session of Congress, proposed legislation aimed at furthering the Order's goals have taken on various forms, but it was not until the 110th session of Congress that legislators proposed a bill that directly mirrored the Order and explicitly codified it into law.[71] On September 24, 2008, Senator Richard J. Durbin presented on the Senate floor the Environmental Justice Act of 2008 (Act).[72] Specifically, the purpose of the Act is to "codify Executive Order 12898 . . . to require the administrator of the Environmental Protection Agency to fully implement the recommendations of the Inspector General of the agency and the comptroller general of the United States . . . ."[73] Moreover, the text following the proposed enabling clause states that "[t]he President of the United States is authorized and directed to execute, administer and enforce as a matter of Federal law the provisions of Executive Order 12898 . . . ."[74] Thus, the Act provides the requisite congressional authorization for the Order to become law.

The flexing muscle of the legislation is simple: the codification of the Order's principle directive that requires agencies to "address" and "identify" disproportionate human health effects on minority and low-income populations.[75] This

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[71] *See supra* note 15 and accompanying text.

[72] Environmental Justice Act of 2008, S. 642, 110th Cong. (2008), 2007 CONG US S 642 (Westlaw).

[73] *Id.*

[74] *Id.* § 2.

[75] *See, e.g., id.*; Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629 (Feb. 16, 1994). While the constitutional validity of the agency model is beyond the scope of this Article, it is important to note the constitutional problem that could arise if the proposed legislation were ever passed. One commentator has suggested that such a mandate, without specifying how federal agencies should go about addressing and identifying these populations, may violate non-delegation principles. Waterhouse, *supra* note 22, at 109. Although the successfulness of a non-delegation challenge is somewhat tenuous, an examination of the jurisprudential policy enunciated in this area of constitutional law provides a beneficial starting point for highlighting why the Act may ultimately fail to provide the EJ Plaintiff with appropriate relief. The support for such an argument is based on the conflict between the structural constitution (the separateness of Articles I, II, and III of the U.S. Constitution) and the authority of a congressionally-

created agency to exert legislative and adjudicative powers. *Compare* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."), *with* U.S. CONST. art. 1, § 8, cl. 1, *and* U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."). As recently as 2001, the Supreme Court reaffirmed the non-delegation doctrine. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472-76 (2001). When Congress confers decision-making authority upon an agency, Congress must "lay down by legislative act an intelligible principle to which the person or body authorized is directed to conform . . . ." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). Thus, a statutory grant of power to promulgate rules or issue orders must be cabined by a guiding principle to ensure that the doctrine's justifications are advanced. Justice Rehnquist delineated the justifications behind the non-delegation doctrine in his concurrence to *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 671 (1980). Justice Rehnquist opined that "the nondelegation doctrine serve[d] three important functions." *Id.* at 685. "First . . . it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Id.* "Second . . . to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion." *Id.* at 685-86. Finally, "and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *Id.* at 686. While prudential concerns may sound the alarm for better statutory guidance that the EPA can follow when applying and interpreting the Act's legislative text, the once proposed legislation still passes muster when examined through the non-delegation principles discussed above. Indeed, the language of the Act implicates broad regulatory powers of federal agencies. *See, e.g.*, S. 642, § 2, 2007 CONG US S 642 (Westlaw); Exec. Order No. 12,898, 59 Fed. Reg. at 7629. This expansive power presumably encompasses numerous actions by the EPA to comply with the Order, such as strengthening existing programs or promulgating new rules. Moreover, this extensive authority is granted without a plethora of minute guidelines to follow when "addressing" or "identifying" adverse environmental effects of its programs on minority or low-income populations. However, even in sweeping regulatory schemes, courts do not demand that statutes provide a "determinate criterion." *See Whitman*, 531 U.S. at 458-59. Furthermore, Section 1-102 of the Order calls for the creation of an Interagency Working Group on Environmental Justice, which will "provide guidance to federal agencies on criteria for identifying disproportionately high . . . environmental effects on minority . . . and low-income populations." Exec. Order No. 12,898, 59 Fed. Reg. at 7629. Even supposing that the Act unconstitutionally delegates Article I powers to the EPA, a non-delegation challenge will likely fail because the Supreme Court does not confine itself to the strictures of a rigid interpretation of the non-delegation doctrine. For the two instances in which the United States Supreme Court has found an invalid delegation of power to the executive branch, see *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935). Still, Congress should heed the policy justifications espoused by Justice Rehnquist before it passes legislation like the Act, especially in light of the unique difficulties within the

language, in conjunction with other language within the statute that requires the EPA to carry out past recommendations by the Inspector General of the EPA and the United States Government Accountability Office, would serve as a catalyst for elevating environmental justice concerns and improving the environmental justice framework within the EPA and other executive agencies.

No one will gainsay the fact that the environmental justice problem requires a two-tier solution. First, the federal government, and specifically the EPA, needs to improve its own policies concerning environmental justice. While the Act's directive is straightforward, it is also acutely vague. Inevitably, this would create problems for the EJ Plaintiff as the EPA interprets the Act's mandate through the promulgation of its rules and regulations to "identify" and "address" environmental justice problems. Still, the Act fulfills the TIER 1 objective by converting what once were federal agency directives under the Order into enforceable statutory responsibilities.[76] Second, direct and tangible relief must be statutorily afforded to the EJ Plaintiff. This by and large is the ultimate pitfall of the proposed legislation, as the remedial consequences of the Act are minimal at best. While the Act may seem to birth a new era of environmental justice relief, the vitality of the Act is diminished by the fact that it still does not provide the EJ Plaintiff the appropriate and immediate relief needed to solve the TIER 2 problem, i.e., a declaratory or equitable remedy for the discriminatory siting and permitting of facilities that adversely affect the environmental quality of life of populations located near these facilities.

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environmental justice field, i.e., reconciling not only the interest in industrial progressivity with the protection of the environment—which traditionally resonates from environmental legislation—but also the interest in extinguishing discrimination through the furtherance of civil rights law. As Part II of this Article will illustrate, comprehensive legislation that corrects the ambiguities in the Order, provides better direction to agencies regarding their responsibilities, and confers a personal and direct remedy to the environmental justice litigant will have to be passed.

[76] Waterhouse, *supra* note 22, at 109.

1. TIER 1: Reaping the Benefits of the Act at an Administrative Pace

Much of the criticism regarding the EPA's failed implementation of the Order has been aimed at the Bush administration's curtailment of funds and programs, but disparagement has also been directed at the EPA's Office of Environmental Justice and the Office of Civil Rights for its poor record of investigating Title VI complaints.[77] Similarly, reports issued by the Inspector General of the EPA (IG) and the United States Government Accountability Office (GAO) proffered criticism against the EPA.[78] For example, the IG's report stated in its opening summary that the "EPA has not fully implemented Executive Order 12898 nor consistently integrated environmental justice into its day-to-day operations," and that the EPA had "not identified minority and low-income, nor identified populations addressed in the Executive Order, and has neither defined nor developed criteria for determining disproportionately impacted."[79] In response to the IG's draft report and recommendations, the EPA concluded:

> The Agency disagrees with the major assertions made by the OIG in the draft evaluation report because we strongly believe that those assertions were based on a mistaken interpretation of the language of the Executive Order. In light

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[77] *See* Franzen, *supra* note 1, at 390 (asserting that the Bush administration cut the budget of the Office of Environmental Justice by more than twenty-five percent and downplayed the disparate environmental effects on minority and low-income populations); *see also* Waterhouse, *supra* note 22, at 110 ("Due to its small staff and limited budget, the thorough investigation of complaints often precedes at a glacial pace.").

[78] U.S. ENVTL. PROT. AGENCY, EVALUATION REPORT: EPA NEEDS TO CONDUCT ENVIRONMENTAL JUSTICE REVIEWS OF ITS PROGRAMS, POLICIES, AND ACTIVITIES (2006), *available at* http:www.epa.gov/oig/reports/2006/20060918-2006-P-00034.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, ENVIRONMENTAL JUSTICE: EPS SHOULD DEVOTE MORE ATTENTION TO ENVIRONMENTAL JUSTICE WHEN DEVELOPING CLEAN AIR RULES (2005), *available at* 2005 WL 1847862; U.S. ENVTL. PROT. AGENCY, EVALUATION REPORT: EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE (2004) [hereinafter IG Rep. 2004], *available at* http://www.epa.gov/oig/reports/2004/20040301-2004-P-00007.pdf.

[79] IG Rep. 2004, *supra* note 78, at i.

> of the above, the Agency asks the OIG to reconsider its basic premise and interpretation of the language of the Executive Order since every recommendation flows from that mistaken interpretation.[80]

The EPA went on at great lengths to support its assertion that the IG rested its recommendations on a "mistaken interpretation" of the Order. The IG's first recommendation was that the EPA issue a memorandum reaffirming the Order, and to remind EPA officers of the agency's priority "that minority and low-income populations [that] are disproportionally impacted [are] the beneficiaries" of the Order.[81] The IG found support for this recommendation in Section 1-101 of the Order, which requires the "Agency to identify and address minority and low-income communities and to define disproportionately impacted."[82]

In rebuttal, the EPA suggested that the IG had strained the language of the Order to "require[] the Agency to develop a national standard . . . for defining and/or determining a minority or low-income community."[83] Rejecting this mistaken

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[80] *Id.* at 58.

[81] *Id.* at 40.

[82] *Id.* at 9.

[83] *Id.* at 40. Continuing on with its contention, the EPA engaged in grammatical semantics:

> By emphasizing those 7 words (identifying....addressing....disproportionately ....minority populations....low-income populations"), [sic] the OIG concludes that the Executive Order requires the Agency to develop a national standard or threshold for defining and/or determining a minority or low-income community. According to the Director of the Office of Environmental Justice, who represented the American Bar Association throughout the development and discussions with the White House Counsel's Office and the Council on Environmental Quality pertaining to Executive Order 12898, this is a strained interpretation of the language, which appears to rest on the word "disproportionately," which was not the intent of the drafters. Following ordinary rules of grammar, the word "disproportionately" modifies the language that immediately follows it. Moreover, grammatically, the phrase "identify and address" does not modify "minority populations and low-income populations" based upon normal sentence structure. Rather, the language of the Executive Order instructs the Agency to identify and address the "disproportionately high and adverse human health or environmental effects of it [sic] programs, policies, and activities." This language requires EPA to *review* all of its programs, policies, and activities in order to identify and address the "disproportionately high and adverse human health or

interpretation, the EPA further contended that the Order merely requires the "agency to conduct internal reviews of its programs, policies, and activities instead of seeking to establish a 'brightline' for identifying an 'environmental justice community.'"[84] Additionally, the EPA asserted that the Order "does not require the Agency to define 'disproportionately impacted'" because the phrase is not in the Order.[85] Further quelling this criticism, the EPA contended that it had consistently integrated environmental justice concepts in its decision-making process.[86]

Although the debate is couched in laudable interpretations and grammatical technicalities, its outcome has the far-reaching effect of determining not only the parameters of the Order's requirements, but also the Act's solution to the TIER 1 problem. The bulk of the once proposed legislation connotes a firm direction towards improving the environmental justice framework throughout the EPA. The Act specifically directs the administrator of the EPA, as promptly as practicable, to carry out certain recommendations of the IG and the GAO.[87] Among these recommendations include: (1) the agency's identification of programs and activities that need an environmental justice review;[88] (2) the agency's consideration of environmental justice concepts when engaging in rulemaking;[89] and (3) that the agency establish "specific time frames for the development of definitions, goals, and measurements regarding environmental justice" and that it establish a definition for a minority and low-income community.[90] Significantly, the Act explicitly rejects the EPA's interpretation of the Order by requiring the EPA to "provide the regions and program offices a standard and consistent definition for a minority and low-income community."[91]

> environmental effects....on minority populations and low- income populations."

Id. (emphasis added).

[84] *Id.*

[85] *Id.*

[86] *Id.* at 42.

[87] *See* Environmental Justice Act of 2008, S. 642, 110th Cong. § 3 (2008), 2007 CONG US S 642 (Westlaw).

[88] *See id.* § 3(a)(1)-(4).

[89] *See id.* § 3(b)(1)-(4).

[90] *See id.* § 3(c)(2).

[91] *See id.*

All of these provisions, however, would be without force if the EPA continued to institute its current definition of "environmental justice"[92] because of the de-emphasis on ensuring that minority and low-income populations are specifically protected.[93] To give the Act its intended force, the Act provides the following statutory definition of "environmental justice" that emphasizes the protection of minority and low-income populations:

> The term 'environmental justice' means the fair treatment and meaningful involvement of all people regardless of race, color, national origin, educational level, or income with respect to the development, implementation, and enforcement of environmental laws and regulations in order to ensure that . . . no minority or low-income population is forced to shoulder a disproportionate burden of the negative human health and environmental impacts of pollution or other environmental hazard.[94]

Although a rudimentary proposition, there is a persuasive argument that the mandatory shift towards implementing this new definition will greatly improve the environmental justice framework within the EPA. For the first time, the EPA will be required to ensure that no minority or low-income population is forced to shoulder a disproportionate burden of adverse environmental impacts whenever the agency implements the statute's provisions. Consequently, the "mistaken interpretation," once thought to strain the language of the Order, would prove victorious in the grammatical debate.

Still, as the EPA moves forward with regulatory development in the area of environmental justice, there remains the fear that a "business as usual" approach will continue throughout the EPA

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[92] *See supra* note 11 and accompanying text.

[93] In the IG's report, however, the EPA contended that:

> [I]t is clear that the Agency has not reinterpreted the Executive Order. Rather, the Agency seeks to ensure that all communities and persons across this Nation secure environmental justice and live in safe and healthful environments. This does not suggest that the Agency is "de-emphasizing minority and low-income populations" as proffered by the OIG.

IG Rep. 2004, *supra* note 78, at 42.

[94] *See* S. 642, 110th Cong. § 2(b)(1), (b)(1)(B) (2008), 2007 CONG US S 642 (Westlaw).

and that the Act "offer[s] communities little hope [for] meaningful change."[95] To begin, the Act imposes no new substantive requirements on the EPA.[96] Accordingly, the antecedent discretion given to the EPA will remain readily present notwithstanding the Order's codification. In other words, the EPA will only be required to give more weight to its existing responsibilities and may strengthen or restrain, at its own discretion, its policies, programs, and activities to comply with the Order and the IG's recommendations.[97] As noted previously, the EPA disagreed with many of the criticisms of the IG and contended that it had fulfilled the goals of the Order. Thus, simply directing the EPA to follow the recommendations of the IG and the GAO would do nothing more than permit the EPA to interpret them as they see fit, which would cause further bureaucratic stagnation.

Most importantly, while the watchdog mechanisms for the statute's enforcement are certainly necessary to solve the TIER 1 problem, they will not adequately combat alleged discriminatory practices encompassed within the TIER 2 problem, i.e., affording a private individual the right to sue a federally funded recipient or the government and its agencies based on the disparate impact standard. First, the Act simply requires EPA's administrator to submit an initial report to Congress regarding the EPA's strategy for implementing the IG and GAO recommendations within six months after enactment, with semi-annual reports thereafter.[98] This can hardly be said to secure expeditious relief for the EJ Plaintiff. And second, other proposed legislation,[99] while providing

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[95] Waterhouse, *supra* note 22, at 110.

[96] *Id.*

[97] *Id.*

[98] *See* S. 642, 110th Cong. § 3(d) (2008), 2007 CONG US S 642 (Westlaw).

[99] *See* Environmental Justice Renewal Act, S. 2549, 110th Cong. (2008), 2007 CONG US S 2549 (Westlaw). The Environmental Justice Renewal Act (EJRA) greatly expands the responsibilities of the Interagency Working Group created by the Order. First, the EJRA requires the Interagency Working Group to publish a Uniform Consideration Guidance Document that outlines what considerations are taken into account when defining environmental justice communities. *Id.* § 3(f). Second, the EJRA mandates that each federal agency ensure that their programs, policies, and activities do not subject any individuals to disparate impact because of race, color, national origin, or income level. *Id.* § 4(a). Third, the EJRA establishes various grant programs to incentivize non-profit, community-based organizations and States to, inter alia, carry out projects to address environmental justice concerns. *Id.* § 7. Finally, the EJRA requires the administrator of the EPA to establish an Environmental Justice Basic

a commendable oversight scheme, will more than likely receive the same opposition as the Act.[100]

2. TIER 2: The Act's Inadequate Private Remedy

The absence of a sufficient private statutory remedy is not glaringly apparent from the language of the Act. To this point, the supposed vigor of the Act lies within Section 2(c), which explicitly revokes Section 6-609 of the Order.[101] Accordingly, the Act creates: (1) a right to enforce the Order at law or equity against the United States and its agencies;[102] and (2) a right to ensure compliance with the Order through judicial review.[103] Therefore, a private cause of action can be brought if policies or rules adopted by the EPA adversely and disproportionately affect minority and low-income populations.[104] At first glance, Section 2(c) is seen as a long overdue tool for the EJ Plaintiff that can serve as a mechanism for truly lifting disparate environmental burdens off of minority and low-income populations. In the end, however, the Act's private right of action is inadequate in part because of the EPA's history of finding agency compliance with the Order, and in part because of inaccurate interpretations of the private action's actual remedial effect. Ultimately, though, the Act's private right

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Training Program. *Id.* § 8. It is important to note, however, that the EJRA's establishment of an Environmental Justice Ombudsman seems to be the only true watchdog mechanism for the legislation's enforcement. The only duties of the ombudsman are to "receive, review, and process complaints and allegations with respect to environmental justice programs and activities of the Environmental Protection Agency." *Id.* § 5(a). The ombudsman reports directly to only the administrator of the EPA and is not required to report to the Office of Environmental Justice. *Id.* § 5(b)(1)-(2).

[100] *See* R. Bruce Josten, *Letter Opposing S. 642, "Environmental Justice Act of 2007" and S. 2549, "Environmental Justice Renewal Act,"* U.S. CHAMBER OF COM. (Sept. 12, 2008), http://www.uschamber.com/issues/letters/2008/080912_opposing_s642_s2549.htm (stating that "[The Environmental Justice Act of 2008 and the Environmental Justice Renewal Act] would exacerbate, rather than alleviate, the fundamental problems inherent in environmental justice" and that the Environmental Justice Renewal Act would essentially cause the "further bloating [of] our already swollen bureaucracy"). It should be noted that "S. 642" actually references "The Environmental Justice Act of 2008," and not "The Environmental Justice Act of 2007." *See supra* note 15.

[101] *See* S. 642, 110th Cong. § 3(d) (2008), 2007 CONG US S 642 (Westlaw).

[102] *See id.*

[103] *See id.*

[104] *See id.*

of action targets the wrong defendant, i.e., although the federal government should be held accountable for violating the Order, the true perpetrator of environmental racism is more than likely state or local governmental entities that receive funds from the federal government.

The EPA's Environmental Appeals Board (EAB) has an extensive history of reviewing whether the EPA's actions complied with the Order, "but has never found that the agency violated the order in any case."[105] Presently, the EAB may review the EPA's efforts to implement the Order in the course of assessing the validity of a permit decision at issue.[106] Due to Section 6-609 of the Order, however, the EAB typically affords discretion to the EPA and frames the issue as a matter of internal agency policymaking.[107] By the Act's inclusion of a private right of action, the Act confronts the EAB's position that the Order is not enforceable at law. Nevertheless, one wonders whether such a shift in EAB review of EPA actions will cause the EAB to vacillate about whether the EPA complied with the underlying goals of the Order, especially when juxtaposed to the many instances in which the EAB found the EPA in compliance with the Order. Moreover, environmental justice claims will more than likely confront similar deference issues when an EJ Plaintiff proceeds by filing a

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[105] Mank, *supra* note 58, at 133.

[106] *See* 40 C.F.R. § 124.19(a) (2011) ("[A]ny person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision."); *see also* Mank, *supra*, note 58, at 132.

[107] *See* Mank, *supra* note 58, at 133-34 (citing Chem. Waste Mgmt. of Ind., 6 E.A.D. 66 (EAB 1995)). For a recent string of EAB cases dismissing arguments based on noncompliance with the Order, see *In re Upper Blackstone Water Pollution Abatement Dist.*, 2010 WL 2363514 (EAB May 28, 2010) (finding that petitioner failed to allege facts showing a disproportionately high impact on environmental justice populations); and *In re Beeland Group, LLC, Beeland Disposal Well # 1 UIC Permit No. MI-009-1I-0001*, 2008 WL 4517160 (EAB Oct. 3, 2008) (finding that the EPA conducted a sufficient "Environmental Justice Screening Evaluation" because the evaluation's data showed that "the percent of minority and percent of people below the poverty level [at the siting location were] at or below the state-level percentages and [were] comparable to county-level percentages"). For cases in which the EAB has remanded a permit for further environmental justice analysis, see *AES P.R., L.P.*, 8 E.A.D. 324 (EAB 1999); and *Knauf Fiber Glass, GmbH*, 8 E.A.D. 121 (EAB 1999).

cause of action in federal court due to the extreme deference courts give to agency decision-making.[108]

There is a credulous misconception that the Act's private remedy allows an individual to sue governmental entities for discrimination under a disparate impact standard.[109] Yet, this interpretation is incorrect, as the Act only permits a cause of action to the extent of privately enforcing the Order once codified; it in no way alters a plaintiff's remedies under Title VI of the Civil Rights Act of 1964.[110] Moreover, the plain language of the Order indicates that only *federal* governmental entities are subject to the Order's mandates.[111] Nothing in the Order or the Act prescribes enforcement of the Order against *state*, *municipal*, or *county* governmental entities.[112] Despite the mistaken reading of the Act, this viewpoint unknowingly raises an interesting point: Why doesn't the Act provide for a private right of action to bring a claim of discrimination against a federally funded permitting entity based on a disparate impact standard? Throughout the history of environmental justice litigation, most notably in claims raising equal protection violations[113] and petitions filed with OCR alleging violations of the Civil Rights Act of 1964, plaintiffs have sought to utilize the disparate-impact standard.[114] And while the Act indeed exhibits Congress's affirmation that federal agencies have a legal obligation to deter and prevent adverse human health effects on minority and low-income populations—which will certainty help to resolve the TIER 1 problem—the Act fails to recognize the pressing concern for providing an EJ Plaintiff with a private right of action based upon a disparate-impact standard. In order to alleviate this legislative neglect, Congress must amend

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[108] *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-45 (1984).

[109] *See* Josten, *supra* note 100 (stating that the Environmental Justice Act of 2007 would effectively overturn the United States Supreme Court's decision in *Alexander v. Sandoval*, discussed in Part IV of this Article, which held that a private right of action to enforce an agency's disparate impact regulations does not exist under Title VI of the Civil Rights Act of 1964).

[110] *See* Environmental Justice Act of 2008, S. 642, 110th Cong. § 2(c) (2008), 2007 CONG US S 642 (Westlaw).

[111] Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629 (Feb. 16, 1994).

[112] *See id.*; *see also* S. 642, 2007 CONG US S 642 (Westlaw).

[113] *See* discussion *supra* Part I.

[114] *See* discussion *infra* Part III(A).

Title VI of the Civil Rights Act of 1964, for this may well be the only means by which to solve the TIER 2 problem of environmental justice.

III. THE CIVIL RIGHTS ACT OF 1964: THE PROMISE AND PERIL OF TITLE VI CLAIMS

A. A Legal Backdrop of Title VI, the EPA, and Environmental Justice

As a governmental agency that provides federal funding to intermediary nonfederal entities,[115] the EPA is bound by the terms of Title VI, which prohibits federal agencies and departments from providing funding to programs that discriminate on the basis of race.[116] Section 601 of Title VI states that, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[117] Furthermore, Section 602 of the Civil Rights Act of 1964[118] commands agencies governed under Title VI to promulgate regulations and provide an administrative complaint process for determining whether one of its recipients is engaged in

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[115] Mank, *supra* note 9, at 25. A typical intermediary nonfederal entity is a state agency that receives grants or other funding that "in turn provides funding to a wide range of beneficiaries, including individuals, local or state governments, non-profit organizations, or private industry." *Id.* Title VI clearly applies "to about 1,500 recipients, including virtually all state or regional siting or permitting agencies," all of whom receive a piece of the several billion dollars allocated to the EPA for funding these agencies. *Id.* at 26.

[116] *See* Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2006). It is notable, however, that the EPA cannot be held liable under Title VI. Draft Title VI Guidance for EPA Assistance Recipients and Draft Revised Guidance for Investigating Title VI Administrative Complaints, 65 Fed. Reg. 39650, 39690 n.191 (June 27, 2000) [hereinafter Investigation Guidance] ("[Title VI] was meant to cover only those situations where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary." (quoting Soberal-Perez v. Heckler, 717 F.2d 36, 38 (2d Cir. 1983))).

[117] Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2006).

[118] For clarification, §§ 601 and 602 are provisions of the corresponding session laws to the enacted statutes within the U.S. Code. The main text of this Article will use the session law sections, as this is the way the statute is commonly cited.

discriminatory practices.[119] Unfortunately, the EJ Plaintiff who brings a claim under Title VI of the Civil Rights Act of 1964 faces hurdles similar to those present in an equal protection suit.[120] These obstacles are best illustrated when the two pertinent Title VI provisions, Section 601 and Section 602, are aligned to judicial precedent.

The Supreme Court has held that: (1) proof of intentional discrimination is required to enforce a private right of action under Section 601;[121] and (2) that no private action exists to enforce Section 602 agency regulations.[122] Thus, similar to the exacting burden involved in an equal protection suit, "Section 601 of Title VI has been ineffective [in] preventing environmental inequities because" the EJ Plaintiff must still prove that a governmental body or industry consciously discriminated on the basis of race.[123] At one time, Section 602 promised to be a formidable legal tool for an environmental justice advocate.[124] Prior to the Supreme Court's decision in *Alexander v. Sandoval*,[125] discussed in greater detail in Part III(B) and IV of this Article, most courts of appeals held that a private right of action existed under an agency's Section 602 regulations prohibiting disparate impact.[126] Under its regulations, the EPA adheres to a disparate

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[119] Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1 (2006). That section provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

Id.

[120] *See supra* Part I (discussing the difficulty of proving intentional discrimination through the use of statistical data showing disparate impact).

[121] Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 606 (1983).

[122] Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

[123] Mank, *supra* note 9, at 23.

[124] Worsham, *supra* note 3, at 646 ("Section 602 holds more promise for environmental justice advocates than Section 601 . . . .").

[125] 532 U.S. 275 (2001).

[126] Mank, *supra* note 9, at 35; *see, e.g.*, S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 518 (D. N.J. 2001), *rev'd*, 274 F.3d 771, 778-79 (3d Cir. 2001).

impact standard that prohibits recipients from using methods that would subject individuals to discriminatory effects,[127] or siting a facility in a location that would subject individuals to discrimination.[128] This standard is noticeably more beneficial because it does not require proof that an intermediary non-federal agency engaged in intentional discriminatory practice.[129] However, on the advent of the Supreme Court's reasoning in *Sandoval* that no such private right of action exists to enforce an executive agency's Section 602 regulations, Title VI has since proved to be a daunting opponent to the EJ Plaintiff, and not the once promised deathly arrow in the EJ Plaintiff's quiver.

B. The EPA's Title VI Administrative Complaint Process

In addition to the legal jargon prohibiting an EJ Plaintiff from utilizing the EPA's disparate impact standard, adequate and immediate relief under Title VI continues to escape the grasp of the EJ Plaintiff despite efforts by the EPA to effectuate the provisions of Title VI. Pursuant to Section 602 of Title VI, the EPA first promulgated its regulations in 1973, "which prohibited a recipient from engaging in actions having discriminatory effects."[130] Later, in 1984, the EPA revised and amended these

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[127] 40 C.F.R. § 7.35(b) (2003). The EPA's disparate-impact standard provides:

> A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.

Id.

[128] *Id.* § 7.35(c). This provision states:

> A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this Part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.

Id.

[129] Worsham, *supra* note 3, at 646 ("[A] plaintiff challenging a siting decision under Section 602 is relieved of the formidable task of proving that the permit in question was issued with the intent to discriminate; a showing of discriminatory effect or disparate impact on the basis of race suffices.").

[130] Mank, *supra* note 9, at 26.

regulations, but reiterated its "historic policy of forbidding recipients from creating disparate impacts."[131] Even though the EPA's Title VI framework includes an external administrative complaint process that presumably applies the EPA's disparate impact standard, EJ Plaintiffs have been hampered in forwarding the environmental justice movement due to mediocre administrative efficiency and legal uncertainty. The following Section of Part III of this Article provides a brief synopsis of the EPA's Title VI external complaint scheme. Next, the Article discusses the precedential environmental justice case of *Rosemere Neighborhood Association v. EPA*, and more specifically, what tangible effect, if any, will result from its disposition.

1. The EPA's Office of Civil Rights and the Draft Guidances

Currently, "a claimant's only recourse for redressing disparate racial impacts from" federally funded environmental agencies rests with the EPA's Office of Civil Rights (OCR).[132] The EPA created the OCR in 1994 and charged it with the task of dealing exclusively with investigating Title VI complaints and implementing the EPA's regulations promulgated under Section 602.[133] In executing the EPA's Title VI responsibilities, the OCR adheres to two distinct, yet related, inter-agency draft guidance documents: the Draft Final Recipient Guidance (Recipient Guidance) and the Draft Revised Investigation Guidance (Investigation Guidance).[134] However, the EPA sought to avoid "subsequent legal challenges by using public notice-and-comment procedures in issuing" the Guidances[135] and to limit judicial

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[131] *Id.*

[132] Waterhouse, *supra* note 22, at 110.

[133] Mank, *supra* note 9, at 27.

[134] Investigation Guidance, *supra* note 116. The EPA issued its final draft of the Recipient Guidance in 2005, which is essentially the same as the original draft. *See* Draft Final Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 70 Fed. Reg. 10625 (Mar. 4, 2005) [hereinafter Recipient Guidance].

[135] Mank, *supra* note 9, at 43. One commentator has argued that the EPA needs to issue a finalized Guidance so that the EPA task force can know what complaints should be accepted and which should be dismissed. *See* Jenna Settino, Editorial, *Is It The End For EPA's Title VI Guidance?*, VT. J. ENVTL. L. (Nov. 30, 2001), http://www.vjel.org/editorials/ED10020.html ("After *Alexander* the administrative complaint process may be the fastest and cheapest means by which communities can

review by not issuing the Guidances as binding rules.[136] Thus, the remaining form of relief employing a disparate impact standard is processed behind closed administrative doors and without any judicial oversight.[137]

The primary purpose of the Recipient Guidance is to assist recipients of federal funding in minimizing the likelihood that a claim of disparate impact discrimination will be filed against the recipient.[138] To further this principal goal, the Recipient Guidance focuses on different approaches that intermediary permitting agencies can use to ensure and "enhance the public involvement portion of their permitting programs" so that a recipient may avoid allegations of public involvement violations of Title VI or violations of the EPA's Title VI implementing regulations.[139] At the same time, the Recipient Guidance denotes a firm commitment to enforcing civil rights laws as a complement to environmental laws, while simultaneously acknowledging the importance of fostering sustainable economic development.[140] The

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stop the issuance of a permit. . . . The EPA is [sic] most appropriate avenue for giving a voice to people who do not have one, and only a finalized Title VI Guidance would help strengthen that voice.").

[136] *See* Bradford C. Mank, *The Draft Title VI Recipient and Revised Investigation Guidances: Too much Discretion for EPA and a More Difficult Standard for Complainants?*, 30 ENVTL. L. REP. 11144 (2000) (stating that "courts would not be bound by the Agency's Title VI guidances, which lack the generally binding effect of a properly promulgated agency rule, but the guidances might influence judicial reasoning"); Investigation Guidance, *supra* note 116, at 39688 ("The statements in this document are intended solely as guidance. This document is not intended, nor can it be relied upon, to create any rights or obligations enforceable by any party in litigation. The EPA may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on its analysis of the specific facts presented."); Recipient Guidance, *supra* note 134, at 10627 ("This document does not change or act as a substitute for any legal requirements. Rather, the sources of authority and requirements for Title VI programs are the relevant statutory and regulatory provisions.").

[137] *See* Settino, *supra* note 135 (stating that "the EPA considers itself the only 'game in town' because of its Title VI administrative complaint process" (citation omitted)).

[138] *See* Recipient Guidance, *supra* note 134, at 10627.

[139] *See id.* at 10628-33. The Recipient Guidance notes that "[m]eaningful public involvement" is an integral part of the permit decision process and that "informing, consulting, and working with communities" during the permitting process to address their concerns can "foster trust and solid relationships between permitting agencies and communities," thereby ensuring that concerns and the reduction of complaints may be dealt with in a timely manner. *Id.* at 10628.

[140] *Id.* The following are some of the EPA's guiding principles for Title VI within the Recipient Guidance: (1) "[a]ll persons regardless of race, color, or national origin are

EPA recognizes that recipients are not required to implement these approaches; however, recipients are still required to comply with the non-discrimination requirements of Title VI and the EPA's implementing regulations.[141] Accordingly, a recipient of federal funds from the EPA is strongly encouraged to institute a program that promotes the principles of environmental justice in order to secure solace from the chance of potential violations.[142] The Recipient Guidance can be divided into four primary parts: (1) Approaches to Meaningful Public Involvement;[143] (2) Suggested Approaches for Reducing Common Title VI Complaints;[144] (3) Evaluating Approaches for Meaningful Public Involvement;[145] and (4) Due Weight.[146] Some states and municipalities are beginning to follow the Recipient Guidance's suggestions via legislation.[147]

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entitled to a safe and healthful environment"; (2) the prevention of Title VI violations and complaints via "[s]trong civil rights enforcement"; and (3) the awareness that "civil rights laws and environmental laws are complementary, and can be achieved in a manner consistent with sustainable economic development." *Id.*

[141] *Id.* at 10628-29.

[142] *Id.* at 10629.

[143] *Id.* at 10629-32.

[144] *Id.* at 10632-33.

[145] *Id.* at 10633-34.

[146] *Id.* at 10634. This section explains that the OCR gives "due weight," when investigating a Title VI complaint, to the measures taken by the recipient to comply with Title VI and the EPA's implementing regulations. *Id.* While the "OCR cannot completely defer to a recipient's own assessment of whether Title VI or EPA's Title VI implementing regulations have been violated[,] . . . [the] EPA . . . can . . . recognize the results of information submitted [by the recipient] and give it appropriate due weight." *Id.*

[147] *See* CONN. GEN. STAT. ANN. § 22a-20a(a)(1)-(4), (b)(1)-(2), (b)(4) (West 2009) (defining terms such as "environmental justice community," "affecting facility," "meaningful public participation," and "community environmental benefit agreement," and requiring applicants seeking permits to locate or expand an affecting facility in environmental justice communities to "file a meaningful public participation plan" that "contain[s] measures to facilitate meaningful public participation in the regulatory process"—including such things as an informal public meeting whereby "the applicant shall make a reasonable and good faith effort to provide clear, accurate and complete information about the proposed facility . . . and the potential environmental and health impacts of such facility . . ."); *see also* CINCINNATI, OHIO, ORDINANCE 210 (June 24, 2009), *available at* http://www.cincinnati-oh.gov/cmgr/downloads/cmgr_pdf37622.pdf. The Ordinance is a "first-in-the-nation Ordinance [that] generally requires new or expanding industrial facilities to get an Environmental Justice (EJ) Permit prior to beginning operation. To get an EJ permit, the facility must demonstrate that they will not cause health problems for the surrounding communities, using methodologies spelled out in the Ordinance." Office of the City Manager, *Cincinnati Environmental*

The Investigation Guidance, on the other hand, is designed to provide a framework for the OCR to process Title VI complaints that allege that a recipient's issuance of a permit creates discriminatory effects.[148] The investigative structure, which comports with the EPA's Title VI implementing regulations, begins with the initial filing of a complaint that alleges that a recipient is engaging in discriminatory practices.[149] Upon receipt of the complaint, the OCR will then decide whether to accept the allegation for investigation or reject it within twenty calendar days.[150] If the OCR formally accepts the complaint, it will first attempt to resolve the matter informally.[151] If informal resolution fails, the OCR will conduct a factual investigation to determine whether the permit at issue creates an adverse disparate impact.[152] At this point, a "180-day" clock begins to run, wherein the OCR must investigate the complaint and report its preliminary findings to the recipient "within 180 calendar days from the start of the complaint investigation."[153]

Additionally, the Investigation Guidance provides a lengthy adverse disparate impact analysis, but it also maintains that the investigation of alleged violations is based upon the "totality of the circumstances that each case presents" and that no "single technique for analyzing and evaluating adverse disparate impact allegations" is applicable to all situations.[154] And while the Investigation Guidance provides a definition of "adverse impact,"[155] it does not provide a definition for "disparate adverse impact."[156] At any rate, the "OCR expects that [this] analytical framework . . . will be omitted, altered, or supplemented to

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Justice, CITY OF CINCINNATI, http://www.cincinnati-oh.gov/cmgr/pages/-17684-/ (last visited Jan. 29, 2012).

[148] Investigation Guidance, *supra* note 116, at 39670.

[149] *See id.* at 39672 (laying out the jurisdictional criteria required for the OCR to investigate a complaint).

[150] *Id.*; *see also* 40 C.F.R. § 7.120(d)(1)(i) (2009).

[151] Investigation Guidance, *supra* note 116, at 39670; *see also* § 7.120(d)(2)(i).

[152] Investigation Guidance, *supra* note 116, at 39670.

[153] *Id.*; *see also* 40 C.F.R. § 7.115(c)(1) (2010).

[154] Investigation Guidance, *supra* note 116, at 39676.

[155] *Id.* at 39864 (defining adverse impact to mean "[a] negative impact that is determined by EPA to be significant, based on comparisons with benchmarks of significance. These benchmarks may be based on law, policy, or science.").

[156] *See id.*

address the particular characteristics of each complaint."[157] The remaining parts of the Investigation Guidance deal with the procedures for informal resolution, a formal finding of noncompliance, the urging of voluntary compliance, and the hearing and appeals process available to a funded recipient for a finding of noncompliance.[158]

2. Agency Inaction: The Reality of *Rosemere Neighborhood Association v. EPA*[159]

Before delving into an examination of the *Rosemere* case, it is necessary to provide a short overview of the Administrative Procedure Act (APA) and its judicial review process.[160] In general, the APA affords a party who is adversely affected by *agency action* the opportunity to seek judicial review of an agency's decision[161] as long as there is "no other adequate remedy in a court."[162] "'Agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[163] But before an aggrieved party is permitted to seek judicial review, it must first overcome the statutory "hurdle" of Section 701(a),[164] which states that "[t]his chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) *agency action is committed to agency discretion by law*."[165] Thus, if a party can first show that the final agency action is not committed to agency discretion by law, and thereafter prove that it has no other adequate remedy, then the agency action is reviewable and subject to reversal under any of the grounds listed in Section 706.[166]

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[157] *Id.* at 39676.

[158] *Id.* at 39670-74.

[159] 581 F.3d 1169 (9th Cir. 2009).

[160] 5 U.S.C.A. §§ 500-96 (West, Westlaw through P.L. 112-28).

[161] *Id.* § 702 (emphasis added).

[162] *Id.* § 704.

[163] *Id.* § 551(13).

[164] Heckler v. Chaney, 470 U.S. 821, 828 (1985); *see also* 5 U.S.C.A. § 701(a).

[165] 5 U.S.C.A. § 701(a) (emphasis added).

[166] *See Heckler*, 470 U.S. at 828. For those grounds most relevant to an EJ Plaintiff's claim, see 5 U.S.C.A. § 706, which provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms

The question of whether a Title VI enforcement action is a matter solely within the EPA and OCR's discretion is troublesome, as the Supreme Court has held that an agency's decision to not prosecute an alleged offender of Title VI should be presumed immune from judicial review.[167] The Court addressed this issue in *Heckler v. Chaney*, wherein the Court interpreted Section 701(a)(2)'s exception to judicial review. The Court affirmed what it called the "no law to apply" standard enunciated by the Court in *Citizens to Preserve Overton Park v. Volpe*,[168] and applied it in the context of an agency's no enforcement action under the Food, Drug, and Cosmetic Act, stating:

> If [Congress] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is "law to apply" under § 701(a)(2), and courts may require that the agency follow that law; if it has not, then an agency refusal to institute proceedings is a decision "committed to agency discretion by law" within the meaning of that section.[169]

Interestingly, the "no law to apply" standard was applied in the Title VI context by a federal court of appeals prior to the *Heckler* decision, albeit to a claim of an agency's alleged total dereliction of its Title VI responsibilities. The court in *Adams v. Richardson*[170] noted that the provisions of Title VI were "not so broad as to preclude judicial review."[171] The court further explained that there is "[a] substantial and authoritative body of case law [that]

> of an agency action. The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] (D) without observance of procedure required by law.

Id.

[167] *Heckler*, 470 U.S. at 831-32 ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

[168] 401 U.S. 402, 410 (1971).

[169] *Heckler*, 470 U.S. at 834-35.

[170] 480 F.2d 1159 (D.C. Cir. 1973).

[171] *Id.* at 1162.

provides the criteria by which noncompliance can be determined, and [that] the statute indicates with precision the measures available to enforce the Act."[172] While *Heckler* can be distinguished from *Adams*—the former dealt with a single instance of final agency non-action as opposed to a claim that an agency wholly abdicated its Title VI responsibilities[173]—this may be a distinction without a difference insofar as environmental justice and Title VI are concerned.[174] Whether a court is faced with an EJ Plaintiff's challenge regarding either contention, the "no law to apply" standard could be satisfied, assuming the appropriate facts are present, under *Adams* and the corresponding Title VI enforcement provisions.[175] As a result, a court could find

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[172] *Id.*

[173] *Compare Heckler*, 470 U.S. at 830-32, *with Adams*, 480 F.2d at 1161-63. Notably, the *Heckler* Court briefly mentioned *Adams* in a footnote to distinguish the current case before the Court, stating:

> Nor do we have a situation where it could justifiably be found that the agency has "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities. *See, e.g., Adams v. Richardson*, 156 U.S.App.D.C. 267, 480 F.2d 1159 (1973) (en banc). Although we express no opinion on whether such decisions would be unreviewable under § 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion."

Heckler, 470 U.S. at 833 n.4.

[174] *See* Dawn Reeves, *Environmentalists Suggest EPA Close Civil Rights Office Due to Petition Backlog*, INSIDE THE EPA, Oct. 15, 2010, *available at* 2010 WLNR 20536675. As of October 2009, the OCR had thirty-seven open investigations, "one third of which date to before 2003." Jonathan Strong, *EPA Civil Rights 'Best Practice' Guidance Plan Fails to Quell Criticism*, INSIDE THE EPA, Oct. 23, 2009, *available at* 2009 WLNR 20928642. The OCR "rejected 129 of 219 complaints since 1993" with ten complaints between 1993 and 2009 being informally resolved. *Id.* As recent as March 2011, a consulting firm conducted an evaluation report of the OCR, the purpose of which was to improve the overall efficiency and effectiveness of three OCR programs, including the Title VI External Complaints and Compliance Office. DELOITTE CONSULTING LLP, FINAL REPORT: EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS (2011), *available at* http://www.epa.gov/epahome/pdf/epa-ocr_20110321_finalreport.pdf.

[175] The *Adams* court went on to discuss the enforcement provisions of Title VI, finding that "Title VI not only requires the agency to enforce the Act, but also sets forth specific enforcement procedures." *Adams*, 480 F.2d at 1162. For the substance of these enforcement procedures, see 42 U.S.C. § 2000d-1 (2006), which provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect

that an EPA's no enforcement action or a history of no enforcement actions, which indicate a total disregard for its Title VI responsibilities, would not be agency action committed to agency discretion and therefore subject to judicial review.[176]

In regards to the "no other adequate remedy" prong, commentators at one time suggested that a plaintiff had an adequate cause of action under Section 601, and arguably Section 602 of Title VI, thereby barring the use of the APA's judicial

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> to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, . . . in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Id.

[176] The discussion of whether such a decision is committed to agency discretion may be all for not when considering 42 U.S.C. § 2000d-2, which states:

> Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.

Id.

review provisions.[177] In fact, the Investigation Guidance itself recites such a position.[178] However, in light of the Supreme Court's decision in *Sandoval*[179] to dispense with an implied private right of action under Section 602, as well as the extreme difficulty of securing relief under Section 601's requirement of proof of intentional discrimination, courts may be more apt to review the EPA's enforcement of its own Title VI regulations, especially in light of the *Rosemere* decision.[180]

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[177] *See* Colopy, *supra* note 14, at 169-71; *see also* Wash. Legal Found. v. Alexander, 984 F.2d 483, 486 (D.C. Cir. 1993) (stating that plaintiffs do not have a "cause of action under the APA" since they have an implied right of action against the recipient); Women's Equity Action League v. Cavazos, 906 F.2d 742, 751 (D.C. Cir. 1990) (asserting that an APA suit would be more disruptive to agency enforcement "than a private suit against the recipient of federal aid" (quoting Cannon v. Univ. of Chicago, 441 U.S. 677, 706 n.41 (1979))).

[178] "[T]hose who believe they have been discriminated against in violation of Title VI or EPA's implementing regulations may challenge a recipient's alleged discriminatory act in court without exhausting their Title VI administrative remedies with EPA." Investigation Guidance, *supra* note 116, at 39671 n.77 (citing Powell v. Ridge, 189 F.3d 387, 397-400 (3d Cir. 1999)); *see also Powell*, 189 F.3d at 397-400 (finding that, per the factors set forth in *Cort v. Ash*, 422 U.S. 66 (1975), an individual has a private right of action to enforce agency regulations promulgated under Section 602 of the Civil Rights Act of 1964).

[179] Before *Sandoval*, at least one case, *S. Camden Citizens in Action v. N.J. Dep't Envtl. Prot.*, 145 F. Supp. 2d 446 (D. N.J. 2001), relied on *Powell* and permitted private citizens to enforce the EPA's Section 602 disparate impact regulations against the New Jersey Department of Environmental Protection. *See id.* at 473-74. In a supplemental opinion following *Sandoval*, the court reversed its decision regarding the private right of action theory. S. Camden Citizens in Action v. N.J. Dep't Envtl. Prot., 145 F. Supp. 2d 505, 516-18 (D. N.J. 2001). Interestingly, though, the court still allowed the plaintiffs to utilize the EPA's Section 602 regulations under 42 U.S.C. § 1983 (2006). *See id.* After an adverse finding against the state agency, the Third Circuit Court of Appeals reversed. *See* S. Camden Citizens in Action v. N.J. Dep't Envtl. Prot., 274 F.3d 771, 790-91 (3d Cir. 2001).

[180] *See* Rosemere Neighborhood Ass'n v. EPA, 581 F.3d 1169 (9th Cir. 2009). It should also be noted that, with respect to the "no other adequate remedy prong," "there are no appeal rights for the complainant built into EPA's Title VI regulatory process." Investigation Guidance, *supra* note 116, at 39672. There are, however, appeal rights for the recipient. The Investigation Guidance explains that if a finding of noncompliance is warranted and imposed upon the recipient, the "recipient[] may request a[n appeal] hearing before" an EPA administrative law judge (ALJ). *Id.* at 39671. Subsequent to the ALJ's determination, the recipient is permitted to file exceptions to the decision within thirty days to the EPA's administrator. *Id.* The administrator then has discretion about whether to review the ALJ's determination. *Id.* If the administrator decides to review the appeal, she may "deny, annul, suspend, or terminate EPA assistance." *Id.* Such decision becomes final within thirty days after the administrator submits a report to Congress. *Id.*

The EPA, and specifically the OCR, has been consistently criticized for failing to meet its own deadlines for investigating and processing Title VI complaints. Recently, in *Rosemere Neighborhood Association v. EPA*, the Court of Appeals for the Ninth Circuit found that the EPA's Office of Civil Rights engaged in a "consistent pattern of delay" in the processing of environmental justice complaints.[181] In *Rosemere*, the plaintiff filed a complaint with the OCR alleging that the City of Vancouver, Washington "failed to properly utilize EPA funds to address lingering environmental problems in low-income and minority communities in the City."[182] Some eighteen months after the OCR accepted the complaint, however,[183] "the OCR still had not issued [its] preliminary findings or recommendations."[184] The plaintiff then filed suit in federal district court under the APA seeking declaratory and injunctive relief compelling the EPA to complete its investigation and to comply with its regulatory deadlines.[185] The issue in *Rosemere* centered on whether the

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[181] *Rosemere*, 581 F.3d at 1175.

[182] *Id.* at 1171.

[183] After Rosemere filed its initial complaint, the City of Vancouver revoked "Rosemere's status as a formal neighborhood association." *Id.* Subsequently, Rosemere filed a "second complaint . . . alleging retaliation by the City." *Id.* "The OCR did not accept or reject this second complaint within twenty days as the regulations require," and it was not until six weeks after "Rosemere filed suit in federal district court in June 2005," that the OCR "accepted the [second] complaint for investigation." *Id.* Thereafter, "[t]he EPA moved to dismiss Rosemere's action as moot" because of its acceptance of Rosemere's claim. *Id.* at 1172. The district court then dismissed Rosemere's complaint. *Id.* Rosemere again filed suit "some eighteen months after" the OCR's acceptance of Rosemere's complaint because it "had not issued preliminary findings or recommendations" within the required timeframe. *Id.* Rosemere sought injunctive relief to compel the EPA to process all of its complaints filed within the next five years within the regulatory deadlines. *Id.* In addition, "Rosemere sought a declaratory judgment that the EPA had violated the regulatory deadlines of 40 C.F.R. § 7.115." *Id.* Presumably, the district court had jurisdiction under the APA because the EPA and OCR had failed to adhere to its properly promulgated rules. *See* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 675 (1985) (asserting that the bar of unreviewability is lifted upon an agency's "refusal to enforce properly adopted agency rules"). The EPA did not refute the court's jurisdiction under the APA. *Rosemere*, 581 F.3d at 1172 n.2. The lower court denied injunctive relief, finding that "Rosemere could not establish the sufficient likelihood of future delays necessary to invoke the voluntary cessation exception." *Id.* Rosemere appealed and the Court of Appeals for the Ninth Circuit reversed. *Id.* at 1176.

[184] *Rosmere*, 581 F.3d at 1172.

[185] *Id.* EPA regulations state that "[w]ithin 180 calendar days from the start of . . . complaint investigation, the OCR will notify the recipient in writing by certified mail . .

plaintiff's claim was moot due to the voluntary cessation exception under the mootness doctrine.[186] Upon finding for the plaintiff, the *Rosemere* court expressed the following sentiments, which are best depicted in a direct excerpt from the opinion:

> Our conclusion that this case is not moot is also supported by an additional fact: What the district court initially classified as an "isolated instance of untimeliness" has since bloomed into a consistent pattern of delay by the EPA. Rosemere has twice encountered that pattern whereby it files a complaint, hears nothing for months, and then only after filing a lawsuit does the EPA respond. This "litigation history" is probative of the likelihood of future delays. . . . Finally, we note that Rosemere's experience before the EPA appears, sadly and unfortunately, typical of those who appeal to OCR to remedy civil rights violations. As indicated earlier, discovery has shown that the EPA failed to process a *single* complaint from 2006 or 2007 in accordance with its regulatory deadlines. *Amicus* the Center on Race, Poverty, & the Environment has helpfully provided further examples of such delay.[187]

As illustrated in *Rosemere*, the APA may be a valuable legal tool to initiate a challenge against the EPA for its failure to enforce its Title VI implementing regulations and, therefore, give rise to a claim that the EPA abdicated its Title VI responsibilities.

In response to the *Rosemere* decision, environmentalists praised the ruling, stating that "no matter what jurisdiction you are in . . . [i]t is at least persuasive precedent . . . ."[188] However, a better reasoned conclusion regarding the effect of *Rosemere* is that the decision only dealt with the procedural aspect of enforcing the provisions of Title VI and not with the substance or merits of the

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. of [p]reliminary findings." 40 C.F.R. § 7.115(c)(1)(i) (2010). The Settlement Agreement between Rosemere Neighborhood Association and the EPA stated that "OCR's failure to process the Retaliation Complaint in accordance with the timeline set forth in 40 C.F.R. S7.115(c)(1) constitutes agency action unlawfully withheld pursuant to the Administrative Procedures Act, 5 U.S.C. S706(1)." DELOITTE CONSULTING LLP, *supra* note 174, at 2.

[186] *See Rosemere*, 581 F.3d at 1172-76.

[187] *Id.* at 1175 (citation omitted).

[188] Dawn Reeves, *Jackson Orders Agency Reforms to Speed Civil Rights Claims Reviews*, INSIDE THE EPA, Sept. 25, 2009, *available at* 2009 WLNR 18813232.

Title VI complaint itself.[189] Prospectively, though, the decision embraces the APA as a tool that the EJ Plaintiff should harness in future environmental justice litigation. Otherwise stated, the analytical difference between judicial review under *Heckler* and review under *Adams*, discussed in Part IV(B)(2)(i) of this Article, may provide the legal foundation on which to premise such a challenge to future EPA no enforcement actions or failures to abide by EPA regulations. On one hand, a factual situation similar to that of *Heckler*—wherein there is a single, isolated decision not to enforce, thereby predisposing the action as one "committed to agency discretion"—may preclude judicial review. On the other hand, a factual situation similar to that of *Adams*—wherein there was a claim of a total dereliction of Title VI responsibilities—may permit judicial review. In summation, an EJ Plaintiff could theoretically argue the following points upon an OCR finding that a recipient did not violate the EPA's Title VI and Section 602 disparate impact regulations: (1) the no enforcement decision of the EPA is not presumptively unreviewable and therefore not committed to agency discretion by law because there is "law to apply," and because there is a history of non-enforcement; (2) that such history of non-enforcement indicates a general policy of the EPA not to enforce the provisions of Title VI; (3) that such general policy indicates a total abdication of Title VI responsibilities; (4) there is no private right of action to enforce Section 602 regulations, nor are there appeal rights for a complainant within the EPA's external Title VI complaint system; (5) that a cause of action under Section 601 is nearly impossible to overcome; and (6) that the APA provides the only recourse for judicial review.[190]

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[189] *Id.*

[190] For a similar argument posited before the *Sandoval* decision, see Colopy, *supra* note 14, at 169-71.

> Despite the hurdles involved in suing a federal agency, environmental justice litigants should not shy away from initiating a Title VI or APA suit against the EPA. The EPA's failure to effectively enforce its nondiscrimination regulations offers a strong indication that the agency has abdicated its Title VI responsibilities. This presumption, together with specific proof that the EPA has funded a program or activity causing racially disparate impacts, would be powerful evidence that the agency has improperly distributed its funding. Additionally, an APA claim can ensure that the EPA does not continue to fund recipients previously found to be in violation of Title VI. The

Although these arguments will still not allow for private enforcement of the EPA's disparate impact regulations against alleged discriminatory recipients of federal funds, they are certain to incite improvement in administering environmental claims within the OCR.[191] If nothing else, a decision rendered by a federal court on the issue would undeniably have the same impact as the *Rosemere* decision.

Ultimately, the *Rosemere* decision demonstrates the EPA's failings to enforce Title VI and the flaws present within its current system of informal investigation and quasi-adjudication. Nonetheless, the environmental justice advocate should not be so naïve as to believe that the impact of the decision will be anything more than unsubstantial. If anything, the *Rosemere* decision is more apt to spur improvement in the TIER 1 problem of environmental justice, i.e., improving the internal management of the executive branch.[192] Thus, the lingering question of how to secure immediate relief for the EJ Plaintiff remains unanswered.

> primary loophole in this type of action, however, is the EPA's reluctance to investigate potential violators and make determinations of noncompliance.

Id. at 170-71.

[191] *Id.* at 171 ("[C]ourts can award various forms of relief in this type of action, including injunctive relief, reversal of agency action, or reversal and remand with a court order for the agency to properly follow its own procedures. The plaintiff cannot, however, receive any direct relief beyond, at best, the termination of funding to the discriminatory recipient.").

[192] *See id.* After *Rosemere*, "EPA Administrator Lisa Jackson order[ed] agency staff to reform and speed up its process for resolving Civil Rights Act discrimination claims . . . ." Reeves, *supra* note 188. Additionally, Lisa Jackson hired Patrick Chang, deputy chief of the Department of Justice's Office of Civil Rights, as senior counsel to help overhaul the OCR. Jonathan Strong, *Legal Uncertainty May Stymie Jackson Bid For Rights Office Overhaul*, INSIDE THE EPA, Nov. 20, 2009, *available at* 2009 WLNR 23329235. Still, the true effect of the *Rosemere* decision remains unknown:

> [O]n Title VI petitions, "I'm not really sure they'll do all that much because they are really in a bind. [These petitions] go against the recipients of federal funding, which are the states. I don't even see the Jackson EPA" coming down hard on the states. "I suspect the historic, awkward relationship will continue to limp along without EPA deciding to start wrapping a lot of knuckles."

Reeves, *supra* note 188 (quoting an industry insider).

C. First, Administrative Delay; Second, an Inadequate System; Third, Timid Enforcement: Waiting for a "Slam Dunk" Case

The *Rosemere* decision supports the views of various commentators and environmental justice proponents that the EPA should reevaluate its Title VI program because "its small staff and limited budget" stymies thorough investigation of complaints and causes delays in the administrative complaint process.[193] The more concrete problems underpinning the inadequacy of the EPA's Title VI external complaint system, however, are the significant drawbacks to filing an administrative complaint with the OCR and proceeding through its non-adversary process. First, the complainant is left largely outside of the OCR's investigatory process.[194] Furthermore, a good faith investigatory effort on the part of the OCR may be undermined by the fact that the Guidances, which purportedly direct the OCR's investigation, are not legally binding.[195] Second, the EPA cannot provide any damages to the plaintiff.[196] Instead, the primary remedy for a finding of noncompliance is the termination of the recipient's funding, but the EPA typically resorts to the informal resolution process through voluntary compliance measures before imposing such a penalty.[197] Moreover, any investigation of a Title VI

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[193] Waterhouse, *supra* note 22, at 110; *see also* Mank, *supra* note 9, at 26 (stating that EPA's regulations were written before the question of environmental inequities became a serious public concern).

[194] The Investigation Guidance notes that "complainants may play an important role in the administrative process; however, that role is determined by the nature and circumstances of the claims." Investigation Guidance, *supra* note 116, at 39671. However, the role of the complainant is somewhat limited. Specifically, the Investigation Guidance merely notes "one of the most important things that complainants may do is to provide OCR with all of the information in their possession relevant to their complaint." *Id.* at 39671-72. Still, the EPA makes it explicit that it does not represent the complainants, "but rather the interests of the Federal government" and that the OCR's investigation "does not involve an adversarial process between the complainant and the recipient." *Id.* at 39672.

[195] *See supra* note 136 and accompanying text.

[196] *See* 40 C.F.R. § 7.130(a) (2011) (stating that the "EPA may terminate or refuse to award or to continue assistance" or by "other means authorized by law to get compliance, including a referral of the matter to the Department of Justice").

[197] *See id.*; *see also* Investigation Guidance, *supra* note 116, at 39670 ("[The] OCR is committed to pursuing informal resolution of Title VI complaints whenever possible

complaint chiefly concerns the actions of nonfederal recipients rather than permittees.[198] Finally, a complainant has very little or no opportunity to challenge the OCR's determination to not enforce the provisions of Title VI against a funded recipient through judicial review under either Title VI or the Administrative Procedure Act.[199]

Akin to the administrative drawbacks of the external complaint process is the legal uncertainty about utilizing the EPA's Section 602 disparate impact regulations in a federal court action initiated by the EPA to prosecute a funded recipient. As discussed previously, some environmentalists are beginning to suggest that the EPA close the OCR altogether due to the large backlog of pending investigations, some dating back to 1994 and 1995.[200] Despite continuing to accept discrimination complaints, the OCR has never found that a challenged action involved a discriminatory purpose.[201] It is speculated that this is due in part to the heightened legal bar set by the Supreme Court in *Sandoval*, which requires Title VI plaintiffs to prove intentional discrimination.[202] Because the OCR has yet to receive a "slam dunk" case on which to test a credible theory, the OCR has avoided pursuing such a claim in federal court for fear that it would be unsuccessful.[203] In *Sandoval*, the Court noted that it had never ruled on whether "regulations promulgated under § 602 of

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because informal resolution will often lead to the most expeditious and effective outcome for all parties."); *id.* at 39673-75 (explaining the OCR's informal resolution process).

198 Recipient Guidance, *supra* note 134, at 10626 n.6 ("The filing or acceptance for investigation of a Title VI complaint does not suspend an issued permit. Title VI complaints concern the programs and activities being implemented by Federal financial assistance recipients, and any EPA investigation of such a complaint primarily concerns the actions of recipients rather than permittees.").

199 *See* Investigation Guidance, *supra* note 116, at 39672 (asserting that "because [the EPA's] Title VI administrative process is not an adversarial one . . . there are no appeal rights for the complainant built into the EPA's Title VI regulatory process"); *see also* discussion *supra* Part III(B)(2).

200 *See supra* note 174.

201 Reeves, *supra* note 174.

202 *Id.*

203 *Id.* The difficulty, some sources say, is that the "OCR has long faced difficulty in finding an adequate test case that would help establish a precedent for proving such impact," and that "EPA's attempts to prepare legal defenses for making a disparate impact discrimination finding 'never passed the laugh test.'" Strong, *supra* note 192 (quoting an anonymous source).

Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601."[204] In other words, the Court has never ruled on whether a disparate impact qualifies as a violation of Title VI.[205] Maybe it is a "lack of political will"[206] on the part of the OCR, but the reticence of the OCR to bring a federal action to enforce its Section 602 regulations against a funded recipient begs the question of when, if ever, an environmental justice suit will triumph on a disparate impact claim of discrimination.

IV. THEREIN LIES A SIMPLE SOLUTION TO A COMPLEX PROBLEM: THE ENVIRONMENTAL JUSTICE ENFORCEMENT ACT OF 2008

As the preceding portions of this Article make clear, finding or proposing a sufficient remedy for discriminatory practices in the siting or permitting of hazardous waste facilities that cause a disparate impact is particularly problematic. Yet, accomplishing this objective is quite achievable if Congress enacts legislation that rejects the Supreme Court's conclusion in *Sandoval*,[207] which held that there is no private right of action to enforce agency regulations promulgated under Section 602 of Title VI.[208] An obvious limitation of the Environmental Justice Act of 2008, discussed in Part II(B) of this Article, is that it does not acknowledge the Supreme Court's decision in *Sandoval*, a matter easily resolved through legislation granting individuals the right to use the EPA's discriminatory effects standard in private suits against federally funded recipients.[209] Interestingly enough, such legislation—the Environmental Justice Enforcement Act (EJEA)[210]—has been on the congressional table since 2006, but has not been reintroduced following its proposal in 2008.[211]

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[204] Alexander v. Sandoval, 532 U.S. 275, 281 (2001).

[205] Strong, *supra* note 192.

[206] *Id.* (quoting a civil rights activist who asserted that this is "the underlying problem" behind the OCR's hesitance to bring such a claim, and "not concern about justifying [a disparate impact challenge] in a potential future court case").

[207] 532 U.S. 275 (2001).

[208] *Id.* at 293; *see also* discussion *supra* Part III(A).

[209] Waterhouse, *supra* note 22, at 110.

[210] Environmental Justice Enforcement Act of 2008, S. 2918, 110th Cong. (2008).

[211] *See id.*

The EJEA would amend the Civil Rights Act of 1964 in two significant ways that effectively overturn the reasoning of *Sandoval*. First, it would amend Section 601 to permit a finding of discrimination under Title VI based on a disparate impact.[212] The insertion of a disparate impact standard is significant because it expresses congressional will to reject *Sandoval*'s conclusion that Section 601 only forbids intentional discrimination.[213] Similarly, "[i]t is . . . beyond dispute that private individuals may sue to enforce § 601['s]" ban on intentional discrimination.[214] In an analogous fashion, Title VI, if amended by the EJEA, would allow an aggrieved EJ Plaintiff to directly enforce Section 601's ban not only on intentional discrimination, but also governmental discrimination based on disparate impact.[215] Moreover, the EJEA amendment would be in accord with both Supreme Court precedent upholding the legality of the disparate impact standard in the Title VII context and also amendments to the Civil Rights Act of 1964 enacted in 1991. The original Civil Rights Act of 1964 "did not include an express prohibition on policies or practices that produce[d] a disparate impact."[216] The United States Supreme Court in *Griggs v. Duke Power Co.*,[217] however, interpreted the Civil Rights Act of 1964 as prohibiting an employer's facially neutral practices that are discriminatory in operation.[218] Twenty years after *Griggs*, Congress statutorily codified Title VII's ban on discrimination to prohibit disparate impact discrimination by passing the Civil Rights Act of 1991.[219] Likewise, in addition to reflecting Title VII's ban on disparate impact discrimination, the EJEA would include the necessary burdens of proof on either party for such a claim.[220]

Second, not only would the EJEA allow an EJ Plaintiff to bring a disparate impact claim pursuant to a private right of

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[212] *See id.* § 3 (amending Section 601 by adding subsection (b)(1)(A) permitting a discrimination claim based on disparate impact).

[213] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 284-87 (1978).

[214] Alexander v. Sandoval, 532 U.S. 275, 280 (2001).

[215] *See* S. 2918, § 3.

[216] Ricci v. DeStefano, 129 S. Ct. 2658, 2672 (2009).

[217] 401 U.S. 424 (1971).

[218] *See id.* at 431.

[219] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

[220] *See* § 2000e-2(k)(1)(A)-(C); *see also* hypothetical *infra* Conclusion.

action under Section 601, but it would also allow such an action under agency regulations promulgated pursuant to Section 602.[221] The Supreme Court in *Sandoval* reasoned that because Section 601 prohibited only intentional discrimination,[222] Section 602's language providing that "[e]ach Federal department and agency . . . is authorized and directed to effectuate the provisions of Section 601,"[223] limited agencies to effectuating rights already created by Section 601.[224] Thus, the Court found that only those agency regulations applying Section 601's ban on intentional discrimination were "covered by the cause of action to enforce that Section" because "[s]uch regulations, if valid and reasonable, authoritatively construe the statute itself."[225] By parallel reasoning, the EJEA would necessarily comply with the Court's reasoning in *Sandoval* because the legislative recognition of disparate impact discrimination as amended in Section 601 would cover agency disparate impact regulations promulgated under Section 602. In this regard, the Court in *Sandoval* found that Section 602 neither focuses on the beneficiaries of Title VI protection nor the funded recipients being regulated, but on agencies that do the regulating.[226] Accordingly, the Court found that "[t]here [is] far less reason to infer a private remedy in favor of individual persons."[227] Once again, the EJEA would counter the Court's restraint on implying a private right of action by statutorily revealing congressional intent to create a private right of action so that an individual could enforce the EPA's disparate impact regulations via the statutory language itself.

While the holding in *Sandoval* is inapposite to the language of the EJEA, the Court did find "that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact" despite the fact that "such activities are

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[221] *See* Environmental Justice Enforcement Act of 2008, S. 2918, 110th Cong. § 4 (2008) (amending Section 602 by adding subsection (b), which states that "[a]ny person aggrieved by the failure of a covered entity to comply with this title, including any regulation promulgated pursuant to this title, may bring a civil action in any Federal or State court of competent jurisdiction to enforce such person's rights").

[222] *Id.* § 2; *see also* Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2006).

[223] *See* Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1 (2006).

[224] Alexander v. Sandoval, 532 U.S. 275, 280 (2001).

[225] *Id.* at 284.

[226] *Id.* at 289.

[227] *Id.* (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 690-91 (1979)).

permissible under § 601."[228] Furthermore, previous attempts to invalidate disparate impact regulations created under Title VI have been rejected by Congress.[229] In effect, the EJEA would not only reinforce Congress's acknowledgment of the legality of disparate impact regulations, but would also serve as a prime test case for the Supreme Court to determine the legal validity of the disparate impact standard under Title VI.

CONCLUSION

Amendments to an already exceedingly complex and expansive civil rights statutory regime may seem like a tall order for Congress to fill. After exploring the various facets of the environmental justice framework to find a sufficient private remedy—the failed legal tactics under the equal protection doctrine, the ineptitude of Executive Order 12,898, the absence of a disparate impact enforcement mechanism in the EJEA, and the flaws apparent within the EPA's Title VI complaint process—it becomes quite clear that amending Title VI of the Civil Rights Act of 1964 is the proper solution for the TIER 2 problem of environmental justice. As a corrective measure, the EJEA helps to resolve the TIER 1 problem by highlighting the past neglect of certain federal departments and agencies by articulating means to better their respective programs and policies. Still, an adequate private enforcement remedy is absent from the proposed statute. Moreover, the equal protection doctrine, while directly coinciding with the concept of securing personal relief for discrimination, has failed to be a useful tool to the EJ Plaintiff. The history of litigation in this area has proven difficult due to the burdensome requirement that a plaintiff prove intentional discrimination.

At present, the only available means for a plaintiff to equip herself with the disparate impact standard is through the Office of Civil Rights within the EPA. Failure to instate a private right of action to enforce the EPA's disparate impact regulations leaves vindicating environmental inequality solely to these agencies,

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[228] *Id.* at 281.

[229] *See* Environmental Justice Enforcement Act of 2008, S. 2918, 110th Cong. § 2(4) (2008).

"which may fail to take necessary and appropriate action because of administrative overburden or other reasons."[230] Furthermore, the EJEA will resolve the legal uncertainty regarding the EPA's administration of its Title VI responsibilities. The "OCR has long avoided pursuing civil rights complaints alleging discrimination based on disparate impact" because they "are difficult to prove and rife with legal uncertainty."[231] Additionally, the EPA fears that "a loss in court would set a damaging legal precedent that could establish a strict test for what qualifies as a disparate impact under civil rights law, making it harder to bring such claims in the future."[232] Even as recently as 2009, Justice Scalia reiterated that the Supreme Court has yet to decide the constitutionality of a disparate impact claim.[233] If the EJEA were passed, it would assure the EPA that it could ferociously proceed to process disparate impact claims, which would help to hold the agency accountable.[234] Notwithstanding this tangential benefit, the EJEA provides a concrete solution to the TIER 2 problem, namely, declaratory and equitable relief via the disparate impact standard. A hypothetical is illustrative:

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[230] *Id.* § 2(12).

[231] Strong, *supra* note 192.

[232] *Id.*

[233] *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2682-83 (2009) (Scalia, J., concurring).

[234] Recently, the EPA issued a 186-page document entitled *Plan EJ 2014*. U.S. ENVTL. PROT. AGENCY, PLAN EJ 2014 (2011), *available at* http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-2011-09.pdf. While a discussion of this document is beyond the scope of this Article, a brief excerpt is provided to generalize its contents:

> *Plan EJ 2014* offers a road map that will enable us to better integrate environmental justice and civil rights into our programs, policies and daily work. The plan focuses on agencywide areas critical to advancing environmental justice, including rulemaking, permitting, compliance and enforcement, community-based programs and our work with other federal agencies. It also establishes specific milestones to help us meet the needs of overburdened neighborhoods through our decision making, scientific analysis and rulemaking. Every American deserves clean air, water and land in the places where they live, work, play and learn. Through our implementation of *Plan EJ 2014*, the EPA will be leading by example in expanding the conversation on environmentalism and working for environmental justice—now and into the future.

Id. (quoting a prefatory message from EPA Administrator Lisa P. Jackson). A "word search" of the document indicated that the word "disparate" only appears twice. *Id.* at 128, 145.

> Acme Corp. seeks to locate an industrial facility that produces hazardous waste in an environmental justice community in State X. A representative of Acme Corp. goes to the Permitting Agency of State X (X), which receives federal funds from the EPA to conduct its operations. X grants the permit to Acme Corp. to locate its facility in the environmental justice community. Residents of the environmental justice community bring a cause of action under the EJEA to enforce the EPA's disparate impact regulations. According to the EJEA, the residents of the environmental justice community (the aggrieved party) must demonstrate that X (the covered entity) "has a policy or practice that causes a disparate impact on the basis of race, color, or national origin."[235] If this is proven, the burden of proof shifts to X "to demonstrate that the challenged policy or practice is related to and necessary to achieve the nondiscriminatory goals of the program or activity alleged to have been operated in a discriminatory manner."[236] However, if X demonstrates that a specific policy or practice, such as the issuance of the permit to Acme Corp., does not cause a disparate impact, then X is not "required to demonstrate that such policy or practice is necessary to achieve the goals of its program or activity."[237] If X were to prove that the issuance of the permit to Acme Corp. was necessary to achieve the nondiscriminatory goals of X's program, the residents of the environmental justice community may still attempt to demonstrate that a less discriminatory alternative policy or practice exists, and that the covered entity refuses to adopt such an alternative.[238]

Under the facts of the hypothetical, if the court found that X discriminated on the basis of race because the entity's practices caused a disparate impact on the residents of the environmental justice community, the court could thereupon order that the permit to Acme Corp. be revoked and that the particular harmful

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[235] Environmental Justice Enforcement Act of 2008, S. 2918, 110th Cong. § 3(b)(1)(A)(i) (2008).

[236] *Id.*

[237] *Id.* § 3(b)(1)(B)(ii).

[238] *Id.* § 3(b)(1)(A)(i).

facility be relocated.[239] In sum, this is precisely what is needed to solve the TIER 2 problem of environmental justice.

Nicholas C. Christiansen[*]

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[239] The remedies available are listed in Section 5 of the EJEA, which provides:

> (a) Claims Based on Proof of Intentional Discrimination—In an action brought by an aggrieved person . . . against a covered entity who has engaged in unlawful intentional discrimination . . . prohibited under this title (including its implementing regulations), the aggrieved person may recover equitable and legal relief (including compensatory and punitive damages), attorney's fees (including expert fees), and costs . . . .
>
> (b) Claims Based on the Disparate Impact Standard of Proof—In an action brought by an aggrieved person . . . against a covered entity who has engaged in unlawful discrimination based on disparate impact prohibited under this title (including its implementing regulations), the aggrieved person may recover equitable relief, attorney's fees (including expert fees), and costs.

Id. § 5(a)-(b). The rights and remedies with respect to Acme Corp.—substantive rights to intervene, reimbursement by X to Acme Corp. for funds expended due to Acme Corp.'s reliance on X's permit, lost profits, or any other type of claim that may arise out of the disparate impact lawsuit—are beyond the scope of this Article.

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